FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS AND ORDERS

JULY 1, 1987 TO JUNE 30, 1988

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DURING THE PERIOD JULY 1, 1987 TO JUNE 30, 1988

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Took oath of office October 29, 1979

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Took oath of office November 18, 1983

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Took oath of office November 27, 1984.

ANDREW J. STRENIO, JR., *Commissioner*
Took oath of office March 17, 1986.

EMILY H. ROCK, *Secretary*
Appointed April 17, 1983

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FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

ALBERTSON'S, INC.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE CLAYTON AND THE FEDERAL TRADE COMMISSION ACTS

Docket C-3064. Consent Order, April 21, 1981—Set Aside Order, July 1, 1987

The Federal Trade Commission has set aside a 1981 consent order with Albertson's, Inc., (97 F.T.C. 343), thus removing the Commission's prior approval requirement because there no longer appears to be a trend toward concentration in the relevant market.

ORDER REOPENING AND SETTING ASIDE ORDER ISSUED ON APRIL 21, 1981

On March 3, 1987, Albertson's, Inc. ("Albertson's") filed a "Petition To Reopen And Set Aside Consent Order" ("Request"), pursuant to section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and section 2.51 of the Commission's Rules of Practice. The request asked the Commission to reopen and set aside the consent order issued on April 21, 1981 ("the order"). Albertson's request was placed on the public record for thirty days, pursuant to section 2.51 of the Commission's Rules. No comments were received.

The complaint in this case was issued under Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act and alleged anticompetitive effects arising from Albertson's acquisition of Fazio's, the California Division of Fisher Foods, Inc., in July 1978. According to the complaint, the relevant product line in which to assess the acquisition was retail sales by retail grocery stores and the relevant geographic market was Los Angeles County and Orange County, California. The order prohibits Albertson's for a ten year period from acquiring, without prior Commission approval, five or more retail grocery stores in fifteen designated states and certain other geographic areas. *Albertson's, Inc.*, 97 FTC 343, 345, 347-348 (1981).

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be altered, modified, or set aside, in whole or in part, if the respondent makes a satisfactory showing that changed conditions of law or fact require the order to be modified or set aside. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4.

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are invited in petitions to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51. To obtain review on this ground, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 24, 1984), at 2 ("Damon Letter"). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. Damon Letter at 2.

After reviewing Albertson's request, the Commission has concluded that respondent has not made a satisfactory showing that changed circumstances require that the order be set aside. The only real change that respondent has shown is that there is no longer a trend toward concentration in the relevant market. That change by itself does not establish that there is no further need for the order.

The Commission has concluded, however, that it is in the public interest to reopen and set aside the order. Albertson's has shown that the prior approval requirements of the order impose costs on respondent and put it at a disadvantage with respect to its competitors who are not under similar restraints. This affirmative need to modify the order must be weighed against the need for continuing the order. The costs shown by Albertson's were foreseeable at the time respondent agreed to the order and would not ordinarily provide a sufficient basis to justify termination of the order. However, respondent has also demonstrated that there is no continuing competitive need for the order in the Los Angeles/Orange County market that was the focus of the Commission's complaint. The respondent has shown that the relevant market is relatively unconcentrated and that any trend toward concentration that may have existed at the time the order issued appears to have been arrested. Accordingly, the reasons for setting aside the order outweigh the reasons for retaining the order.

The Commission has likewise concluded that it is in the public interest to set aside the prior approval requirements of the order with respect to the fifteen states and other geographic areas which are designated therein. The allegations of the complaint related exclusively to the Los Angeles/Orange County market and with the setting aside of the primary relief, the ancillary relief should also be set aside.

Accordingly, *It is ordered*, That this matter be, and it hereby is reopened and that the Commission's order issued on April 21, 1981, shall be set aside as of the effective date of this order.

Commissioner Bailey was recorded as voting in the negative.

IN THE MATTER OF

AMERICAN HOECHST CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3215. Complaint, July 2, 1987—Decision, July 2, 1987

This consent order permits, among other things, American Hoechst Corp. to divest certain polyester fiber businesses. The respondent must make the divestiture to a Commission-approved acquirer within one year and must obtain the Commission's prior approval for certain acquisitions for the next ten years.

Appearances

For the Commission: *Rhett Krulla, Ronald B. Rowe,* and *Jeffrey I. Zuckerman.*

For the respondents: *William R. Norfolk, Sullivan & Cromwell,* Washington, D.C. and *William Pelster, Skadden, Arps, Slate, Meagher, & Flom,* New York City.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents, American Hoechst Corporation, Hoechst Aktiengesellschaft, referred to herein collectively as "Hoechst," and Celanese Corporation, corporations subject to the jurisdiction of the Commission, have entered into an agreement, described in paragraph 15 herein, that, if consummated, would violate the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that said agreement and the actions of respondents to implement that agreement constitute violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, the Commission hereby issues its Complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows: [2]

I. DEFINITIONS

1. For purposes of this complaint, the following definitions shall apply:

a. *"Hoechst"* means American Hoechst Corporation, its parent, Hoechst Aktiengesellschaft, its predecessors, subsidiaries (including, but not limited to, Hostachem Acquisition Incorporated), divisions, groups, affiliate entities (including, but not limited to, Wacker and related entities), and each of their past or present directors, officers, employees, agents, and representatives; and each partnership, joint venture, joint stock company, or concession in which Hoechst is a participant. The words "subsidiary," "affiliate," and "joint venture" refer to any partial (10 percent or more), as well as total, ownership or control.

b. *"Celanese"* means Celanese Corporation, its predecessors, subsidiaries, divisions, groups, affiliate entities, and each of their past or present directors, officers, employees, agents, and representatives; and each partnership, joint venture, joint stock company, or concession in which Celanese is a participant. The words "subsidiary," "affiliate," and "joint venture" refer to any partial (10 percent or more), as well as total, ownership or control.

c. The *"acquisition"* means the transaction described, in whole or in part, in paragraph 15 of this complaint.

d. *"Polyester fibers"* or *"polyester"* means manufactured fibers in which the fiber-forming substance is any long-chain synthetic polymer composed of polyethylene teraphthalate, a chemical polymer derived from the polycondensation of ethylene glycol with either dimethyl teraphthalate or [3] teraphthalic acid. "Polyester fibers" include polyester staple and polyester filament.

e. *"Textile polyester fibers"* means any polyester fibers used in the production of textiles, which includes fabrics and yarns used primarily in apparel, carpeting, home furnishings, and automotive applications.

f. *"Textile polyester filament"* means continuous threads, or "filaments," of polyester produced for textile applications. "Textile polyester filament" does not include polyester staple.

g. *"Polyester staple"* means any short fiber of polyester that is cut from spun polyester. "Polyester staple" includes fiberfill and tow.

II. AMERICAN HOECHST CORPORATION

2. Respondent American Hoechst Corporation ("American Hoechst") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 1041 Route 202–206 North, Somerville, New Jersey. American Hoechst is a wholly-owned subsidiary of the West German corporation, Hoechst Aktiengesellschaft.

3. American Hoechst is one of the largest producers of textile polyester fibers, including both polyester staple and textile polyester

filament, in the United States. Overall operations of American Hoechst in the United States include the production and sale of various petrochemicals, plastics, and pharmaceuticals. [4]

4. Respondent American Hoechst had sales of approximately $1.6 billion in 1985 on overall operations of the company in the United States.

5. American Hoechst's indirect wholly-owned subsidiary, Hostachem Acquisition Incorporated, a corporation organized and existing under the laws of the State of Delaware, is a holding company that has been formed to purchase the capital stock of Celanese.

6. American Hoechst is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. HOECHST AKTIENGESELLSCHAFT

7. Respondent Hoechst Aktiengesellschaft ("Hoechst AG") is a foreign corporation organized and existing under the laws of the Federal Republic of Germany, with its principal place of business located at D-6230 (Main) 80, Frankfurt, Federal Republic of Germany. Hoechst AG is the corporate parent of American Hoechst.

8. The Hoechst group of companies produces a diverse range of products, including polyester and polyester raw materials. Respondent Hoechst AG is one of the largest producers of polyester fibers in the world.

9. Net income for respondent Hoechst AG overall in 1985 was approximately $499 million on sales of $14.5 billion. The fibers and fiber raw materials business [5] segment of the company accounted for 10 percent of total corporate sales.

10. Hoechst AG is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. CELANESE CORPORATION

11. Respondent Celanese Corporation ("Celanese") is a corporation organized and existing under the laws of the State of Delaware, with its principal executive offices and place of business located at 1211 Avenue of the Americas, New York, New York.

12. Celanese produces polyester fibers at manufacturing facilities

in the United States, Canada, and Mexico. Celanese is the second largest producer of textile polyester fibers, including both polyester staple and textile polyester filament, in the United States, and is the only producer of textile polyester fibers in Canada.

13. Respondent Celanese's overall net income was $178 million in 1985 on sales of approximately $3 billion.

14. Celanese is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. **[6]**

V. THE ACQUISITION

15. On or about November 3, 1986, Hoechst commenced a cash tender offer for up to 100 percent of the issued and outstanding shares of Celanese common stock and preferred stock, with the intent of effecting a merger of Hostachem Acquisition Incorporated, a Delaware corporation wholly-owned by Hoechst, into Celanese, all as contemplated in the Agreement of Merger entered into among Hoechst, its subsidiary, and Celanese, on November 2, 1986. Pursuant to that Agreement, Celanese's Board of Directors has approved Hoechst's tender offer, has recommended its acceptance by Celanese stockholders, and has agreed to approve the merger of Hostachem Acquisition Incorporated into Celanese following the tender offer. If the acquisition is consummated as presently contemplated, the total value of the transaction will be approximately $2.7 billion. Through this proposed stock acquisition, Hoechst will effectively acquire the polyester business of Celanese.

VI. TRADE AND COMMERCE

16. For purposes of this complaint, relevant lines of commerce in which to evaluate the effects of the acquisition are:

a. the manufacture, distribution, and sale of polyester staple; and
b. the manufacture, distribution, and sale of textile polyester filament. **[7]**

17. For purposes of this complaint, the relevant section of the country in which to evaluate the effects of the acquisition with respect to each of the relevant lines of commerce is the United States as a whole.

VII. MARKET STRUCTURE

18. In 1986, approximately 2.1 billion pounds of polyester staple was produced in the United States. The polyester staple market is highly

concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by four-firm and eight-firm concentration ratios.

19. In 1986, approximately 844 million pounds of textile polyester filament was produced in the United States. The textile polyester filament market is highly concentrated, whether measured by the HHI or by four-firm and eight-firm concentration ratios.

VIII. ENTRY CONDITIONS

20. It is difficult to enter into the manufacture, distribution, and sale of polyester staple or of textile polyester filament.

XI. ACTUAL COMPETITION

21. Hoechst and Celanese are actual competitors in the manufacture, distribution, and sale of polyester staple and of textile polyester filament. [8]

X. EFFECTS

22. The aforesaid acquisition, if consummated, will significantly increase the levels of concentration in the relevant markets.

23. The effect of the aforesaid acquisition, if consummated, may be substantially to lessen competition in each of the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. it will eliminate actual competition between Hoechst and Celanese and between Celanese and others in the relevant markets; and

b. it will significantly enhance the possibility of collusion or interdependent coordination among the remaining firms in the relevant markets.

XI. VIOLATIONS CHARGED

24. The proposed acquisition of the capital stock of Celanese by Hoechst would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

25. The Agreement of Merger described in paragraph 15 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

26. The proposed acquisition of the capital stock of Celanese by Hoechst would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. [9]

Chairman Oliver was recorded as voting in the negative.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition of all of the issued and outstanding common and other voting stock of Celanese Corporation ("Celanese") by Hostachem Acquisition Incorporated, an indirect wholly-owned subsidiary of American Hoechst Corporation ("American Hoechst") which is a subsidiary of Hoechst Aktiengesellschaft (collectively "Hoechst") and the subsequent mergers of Celanese with Hostachem Acquisition Incorporated and Hostachem with American Hoechst, and Hoechst and Celanese, having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration, and which, if issued by the Commission would charge Hoechst and Celanese with violations of the Clayton Act and Federal Trade Commission Act; and [2]

Respondents Hoechst and Celanese, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Hoechst Aktiengesellschaft is an alien corporation organized and existing under the laws of the Federal Republic of Germany, with its executive offices located at 6230 Frankfurt (Main) 80, Federal Republic of Germany. [3]

2. American Hoechst Corporation, a wholly-owned subsidiary of Hoechst Aktiengesellschaft, is a corporation organized and existing under the laws of the State of Delaware, with its executive offices located at 1041 Route 202–206 North, Somerville, New Jersey.

3. Celanese Corporation is a corporation organized and existing

under the laws of the State of Delaware, with its executive offices located at 1211 Avenue of the Americas, New York, New York.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Hoechst and Celanese, and the proceeding is in the public interest.

ORDER

I.

It is hereby ordered, That as used in this order, the following definitions shall apply:

(a) *"Acquisition"* means Hoechst's acquisition of shares of the common and other voting stock of Celanese, a merger of Celanese with Hostachem Acquisition Incorporated and a merger of Hostachem with American Hoechst. [4]

(b) *"Polyester staple and textile filament fibers"* means synthetic fiber composed of polyethylene terephthalate, including both cut fiber and continuous filaments, used in apparel, carpeting, upholstery, home furnishing, or other textile applications, but not including monofilament, spunbond, sewing thread, and high-tenacity industrial filament (which includes industrial filament produced or sold by Celanese's Industrial Fiber business unit).

(c) *"Polyester textile fiber assets and businesses"* means assets and operations in the United States relating to the manufacture, distribution, sale, research and development of polyester staple or textile filament fibers, including goodwill, customer files, patents, know how, and the "Fortrel" trademark for Celanese's and the "Trevira" trademark for American Hoechst's polyester textile fiber business, respectively, as well as assets and operations related to the manufacture, distribution, sale, research and development of polyethylene terephthalate for use in the manufacture of polyester staple and textile filament fibers.

(d) *"Celanese"* means Celanese Corporation, as it was constituted prior to the acquisition, including its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by Celanese and their respective successors and assigns. **[5]**

(e) *"Hoechst"* means Hoechst Aktiengesellschaft, American Hoechst Corporation, Hostachem Acquisition Incorporated, their predecessors, subsidiaries, divisions, groups and affiliates controlled by Hoechst and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

II.

It is further ordered, That:

(A) Hoechst shall divest, absolutely and in good faith, within twelve months from the date this order becomes final, either:

1. the following portion of the polyester textile fiber assets and businesses in the United States of the Celanese Textile Fibers Business Group, which group is included in the descriptions on pages 5–6 of the Celanese Corporation 1985 Annual Report on Form 10–K filed with the Securities and Exchange Commission and on pages 12–13 of the 1985 Celanese Annual Report:

(a) all assets at Celanese's Florence ("Palmetto"), South Carolina and Fayetteville, North Carolina manufacturing facilities; [6]

(b) All polyester staple production capacity, and all polyester terephthalate production capacity currently used in the production of polyester staple, at Celanese's Salisbury, North Carolina manufacturing facility and such additional assets as are currently used at that facility in the production of polyester staple fiber and are requested by the prospective acquirer provided, however, that Hoechst (i) is not required to divest the assets at the facility that relate to the supply, utilities and service arrangements and agreements that Hoechst is required to supply in accordance with the provisions of paragraph II (B) 3; (ii) is only required to permit the acquirer to use on a nonexclusive basis (under a suitable license, lease, contract or similar arrangement), and is not required to divest, current technology or know-how at the Salisbury facility that is also used or usable in the businesses of Celanese or Hoechst that are not being divested; and (iii) will not be required to divest any portion of the Salisbury manufacturing facility, or any assets at that facility, if the Commission in its discretion determines that such divestiture is not required; [7]

(c) such assets at Celanese's Dreyfus Research Park in Charlotte, North Carolina as the prospective acquirer requests and will continue to use in conjunction with the operations of Celanese's polyester textile fiber manufacturing facilities that are divested to that acquirer;

(d) two of the type 30 POY spinning machines and associated winding equipment currently located and operating at Celanese's plant located in Greenville, South Carolina that the acquirer intends to use to produce POY textile filament in the United States;

(e) such other Celanese polyester textile fiber assets and business in the United States as are currently used by the Celanese Textile Fibers Business Group and are requested by the prospective acquirer for continued use in the administration, manufacture, distribution, sale, research and development, or technical support of polyester staple and textile filament fibers, except such of those assets specified in the following provision to this paragraph II (A) 1. **[8]**

Provided, however, that Hoechst shall not be required to divest:

(i) Celanese's facilities at Shelby, North Carolina and (except as provided in II (A) 1 (d), above) Greenville, South Carolina,

(ii) the "Fortrel" trademark unless the II A 1 properties are divested and the prospective acquirer requests the right to use that trademark and then Hoechst is only required to provide suitable licenses or similar arrangement for use of that trademark in the United States for polyester staple and textile filament fibers; or

(iii) Celanese's polyester textile fiber assets and businesses that satisfy the following conditions: 1) either such assets are administrative facilities that are not located at the facilities or locations specified in paragraph II (A) 1 (a), (b) and (c) or such assets consist of technology or know-how, 2) such assets have been used or continue to be used in conjunction with other assets of Celanese not required to be divested, and 3) Hoechst provides the acquirer in lieu of **[9]** divestiture of such assets suitable leases, licenses or similar arrangements on a nonexclusive basis.

(The foregoing assets and businesses are hereinafter referred to as the "II A 1 properties.") or

2. All of the polyester textile fiber assets and businesses of American Hoechst, including:

(a) all of the polyester textile fiber assets and businesses of Hoechst Fiber Industries ("HFI"), a division of American Hoechst; provided, however, Hoechst is entitled to negotiate suitable arrangements with the acquirer necessary to operate the retained assets and businesses relating to the manufacture and sale of monofilament, spunbond and solid-state resins;

(b) all polyester staple and textile filament production capacity at American Hoechst's, Spartanburg, South Carolina manufacturing facility and such additional assets as are currently used at that facility in the production of polyester staple and textile filament fiber and are requested by the **[10]** prospective acquirer; provided, however, that Hoechst (i) is not required to divest the assets at that facility that relate to the supply, utilities and service arrangements and agreements that Hoechst is required to supply in accordance with the provisions of paragraph II (B) (3); and (ii) is only required to permit the acquirer to use on a nonexclusive basis (under a suitable license, lease contract or similar arrangement), and is not required to divest, current technology or know-how at the Spartanburg facility that is also used or useable in the businesses of Celanese or Hoechst that are not being divested.

(c) all the capacity to manufacture polyethylene terephthalate necessary to ensure a self sufficiency of supply for the divested assets at the capacity levels that they currently operate; and

(d) such research and development assets at Spartanburg, South Carolina as the prospective acquirer requests and will continue to use in conjunction with the operations of American Hoechst's polyester textile fiber [11] manufacturing facilities that are divested to that acquirer.

Provided, however, that Hoechst shall not be required to divest the "Trevira" trademark unless the II A 2 properties are divested and the prospective acquirer requests the right to use that trademark and then Hoechst is only required to provide suitable licenses or similar arrangement for use of that trademark in the United States for polyester staple and textile filament fibers.

(The foregoing assets and businesses are hereinafter referred to as the "II A 2 properties".)

(B) In conjunction with the divestiture, Hoechst and Celanese shall:

1. assign to the acquirer of the II A 1 properties the Service Agreement dated March 13, 1981 (and certain related agreements) between Celanese and Monsanto Company;

2. provide any easements and rights of way that are requested by the prospective acquirer and that facilitate the operation of the II A assets; [12]

3. if the polyester staple operations of Celanese's Salisbury facility or the II A 2 properties are divested, provide the acquirer, at fair market price, supply arrangements and utilities and service agreements (such as nitrogen, inert air, process and drinking water, steam, and waste treatment) that are requested by the prospective acquirer for use in conjunction with the assets and businesses sold to the acquirer; and

4. if the II A 2 properties are divested, provide the acquirer, at fair market prices, supply arrangements for terephthalic acid and dimethyl-terephthalate that are requested by the prospective acquirer for use in conjunction with the assets and businesses divested to the acquirer.

(Hereinafter referred to as "II B agreements".)

(C) Hoechst and Celanese shall:

1. retain all liabilities arising from the operation of any of the II A

properties that are divested through and including, but not following, the date of closing of the sale of such properties; [13]

2. ensure that all persons who accept employment with any acquirer of the II A 1 properties shall become fully vested in their account balances under Celanese's Stock Bonus and Investment Plan Trust;

3. transfer from Celanese's pension plan if the II A 1 properties are divested, or from Hoechst's pension plan if the II A 2 properties are divested, to a pension fund(s) to be established by an acquirer or acquirers of those properties assets equal to the actuarially accrued liability as of the closing date, or otherwise secure the accrued pension benefits, with respect to Celanese, or, as the case may be, Hoechst, employees who accept employment with an acquirer or acquirers of any II A property; and

4. encourage its employees who are employed at any divested II A property to accept employment with any acquirer(s) of any II A property.

(D) Hoechst and Celanese shall maintain the viability and marketability of the assets required to be divested and shall not cause or permit the destruction, removal or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear. [14]

(E) II A 1 or II A 2 properties shall be divested to and II B agreements and agreements provided for in paragraph II (A) made with, an acquirer or acquirers, and only in a manner, that receives the prior approval of the Commission. The purpose of the divestiture and agreements is to ensure the continuation of the assets as ongoing, viable enterprises engaged in the manufacture, distribution, sale, research and development of polyester staple and textile filament fibers in the United States and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

(F) If Hoechst has not divested the II A 1 or II A 2 properties within the twelve-month period specified in II (A), Hoechst shall consent to the appointment of a trustee by the Commission to divest the II A 1 properties. In the event that the Commission brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*), or any other statute enforced by the Commission, Hoechst shall consent to the appointment of a trustee in such action. The appointment of a trustee shall not preclude the Commission from seeking civil penalties and other relief available to it for any failure by Hoechst to comply with paragraphs II (C) through VI of this order.

(G) If a trustee is appointed by the Commission or a court pursuant to paragraph II (F) of this order, Hoechst shall [15] consent to the following terms and conditions regarding the trustee's duties and responsibilities:

1. The Commission shall select the trustee, subject to Hoechst's consent, which shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall have the power and authority to divest any II A 1 properties or enter into any II B agreements and other agreements provided for in paragraph II (A) that have not been divested or entered into by Hoechst within the time period for divestiture in paragraph II(A). The trustee shall have 18 months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission and, if the trustee is appointed by a court, subject also to the prior approval of the court. If, however, at the end of the eighteen-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission or by the court for a court-appointed trustee. Provided, however, the Commission or the court for a court-appointed [**16**] trustee may only extend the divestiture period two times.

3. The trustee shall have full and complete access to the personnel, books, records and facilities of any business that the trustee has the duty to divest, and Hoechst shall develop such financial or other information relevant to the assets to be divested as such trustee may reasonably request. Hoechst shall cooperate with the trustee, and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

4. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with the order's absolute and unconditional obligation to divest and the purposes of the divestiture as stated in paragraph II(E).

5. The trustee shall serve at the cost and expense of Hoechst on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission or the court of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to [**17**] Hoechst and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting the trust property.

6. Promptly upon appointment of the trustee and subject to the approval of the Commission, Hoechst shall, subject to the Commission's prior approval, and consistent with provisions of this order, execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to cause divestiture and sign agreements.

7. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed.

8. The trustee shall report in writing to the Commission and Hoechst every sixty days concerning the trustee's efforts to accomplish divestiture.

(H) The Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I, shall continue in effect until such time as (1) all the II A 1 properties, except Type 30 POY spinning machines at Greenville, have been divested by Hoechst or [**18**] a trustee pursuant to this order, or (2) all of the II A 2 properties have been divested by Hoechst pursuant to the order.

III.

It is further ordered, That, within sixty days after the date of service of this order, and every sixty days thereafter until Hoechst and Celanese have fully complied with the provisions of paragraph II of this order, Hoechst and Celanese shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying with, or have complied with that provision and those reports shall be accorded such confidential treatment as is available pursuant to Section 6(f) and 21 of the Federal Trade Commission Act, as amended. Hoechst and Celanese shall include in compliance reports, among other things that are required from time to time, a full description of contacts or negotiations for the divestiture of the paragraph II A properties, including the identity of all parties contacted. Hoechst and Celanese also shall include in compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture. [**19**]

IV.

It is further ordered, That for a period commencing on the date of service of this order and continuing for ten years from and after the date of service of this order, Hoechst shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, assets used or previously used in (and still suitable for use in), or any interest in, or the whole or any part of the stock or share capital of, any company engaged in, the manufacture, distribution, or sale of polyester staple and textile filament fibers in the United States. Provided, however, that these prohibitions shall not relate (i) to the construction of new facilities, (ii) to the acquisition of assets outside of the United

States, (iii) to the acquisition of any interest in, or the whole or part of the stock or share capital of any company engaged in the manufacture, distribution or sale of polyester staple and textile filament fibers outside of the United States if such company has annual sales in the United States of less than one percent of the then current respective total United States annual sales of polyester staple fibers or polyester textile filament fibers or (iv) to the acquisition of used assets that Hoechst intends to relocate to existing or new facilities for use in production of polyester staple and textile filament fibers if such used assets have production capacity of less than one percent of the United States' then current respective capacity for the production of polyester staple fibers **[20]** or polyester textile filament fibers.

One year from the date of service of this order and annually thereafter, Hoechst shall file with the Commission a verified written report of its compliance with this paragraph.

V.

For the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to American Hoechst Corporation or Celanese made to their principal offices, Hoechst and Celanese shall permit any duly authorized representatives of the Commission:

1. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Hoechst or Celanese relating to any matters contained in this order; and
2. Upon five days' notice to American Hoechst Corporation or Celanese and without restraint or intereference from them, to interview officers or employees of Hoechst or Celanese, who may have counsel present, regarding such matters. [21]

VI.

It is further ordered, That Hoechst and Celanese shall notify the Commission at least thirty days prior to any change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of this order.

Chairman Oliver was recorded as voting in the negative.

DISSENTING STATEMENT OF CHAIRMAN DANIEL OLIVER

Two separate concerns lead me to dissent from final Commission acceptance of the consent order in this matter. First, I do not believe that Hoechst's acquisition of Celanese is likely to lessen competition substantially in the production, distribution or sale of either polyester staple or textile polyester filament, the two relevant product markets alleged in the complaint. The theory of the complaint is that the acquisition—if not modified pursuant to the consent order—may have this effect in the United States. However, strong competition from foreign producers is likely to make it impossible for domestic producers—including the combined Hoechst-Celanese operation—to exercise any significant degree of market power, whether to raise prices above competitive levels or to injure competition in any other respect. There is therefore no reason to believe that the acquisition violates section 7 of the Clayton Act, and the consent order is unnecessary.

Second, the consent order will require the respondent—for ten years—to secure Commission approval prior to acquiring virtually any assets located in the United States that are used to manufacture, distribute, or sell polyester staple or textile filament fibers. If, as I have concluded, there is no reason to believe that the current acquisition would violate section 7, then there is no reason to require prior approval of future equally innocuous acquisitions. The Commission has recently determined that the appropriateness of prior approval provisions depends on "industry market structure and market conditions."[1] The record in this case does not establish that "market conditions and market structure in [the covered markets] are such that all such acquisitions . . . necessarily [would be] anticompetitive."[2]

For both reasons, I therefore respectfully dissent from final approval of the consent order in this matter.

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[1] *American Medical International*, 104 FTC 1, 224 (1984); *accord*, *Hospital Corp. of America*, 106 FTC 361, 514 (1985), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, _ U.S. _, No. 86-149. (May 3, 1987).

[2] *See American Medical International*, 104 FTC at 225; *see also Hospital Corp. of America*, 106 FTC at 513-17.

IN THE MATTER OF

L'AIR LIQUIDE SOCIETE ANONYME, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT & SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3216. Complaint, July 15, 1987—Decision, July 15, 1987

This consent order requires, among other things, L'Air Liquide to divest some assets to resolve any antitrust concerns in the production and sale of liquid gases and to obtain prior Commission's approval for similar acquisitions.

Appearances

For the Commission: *Ernest A. Nagata.*

For the respondents: *Robert A. Lipstein, Coudeot Brothers,* Washington D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that L'Air Liquide Societe Anonyme pour L'Etude et L'Exploitation des Procedes Georges Claude has undertaken an acquisition of the voting securities of Big Three Industries, and a proposed merger of Big Three Industries with a subsidiary of L'Air Liquide Societe Anonyme pour L'Etude et L'Exploitation des Procedes Georges Claude, either of which, if consummated, would result in a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21 and Section 5(b) of the Federal Trade Commission Act, as amended 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

(a) *"L'Air Liquide"* means L'Air Liquide Societe Anonyme pour L'Etude et L'Exploitation des Procedes Georges Claude, its officers, directors, agents, representatives, employees, successors and assigns together with all subsidiaries it controls.

(b) *"BTI"* means Big Three Industries, its officers, directors, agents, representatives, employees, successors and assigns together with all subsidiaries it controls.

(c) "*Acquisition*" means L'Air Liquide's acquisition of the voting securities of BTI.

(d) "*Merger*" means the proposed merger of BTI with a subsidiary of L'Air Liquide.

(e) "*Air separation gases*" means oxygen, nitrogen, and argon in gaseous or liquid form.

(f) "*Merchant" oxygen, nitrogen, or argon* means any such gas sold in liquid form or packaged in cylinders.

II. L'AIR LIQUIDE

2. L'Air Liquide is a corporation organized and doing business under the laws of France, with its principal office at 75 Quai d'Orsay, Paris 75321 France.

3. L'Air Liquide is an 88% stockholder in Liquid Air Corporation ("LAC"), a corporation organized and doing business under the laws of Delaware, with its principal office at California Plaza, 2121 North California Blvd., Walnut Creek, California.

4. For the year ending December 31, 1985, L'Air Liquide's total net sales were $2.8 billion, and its total assets amounted to approximately $3 billion.

5. L'Air Liquide does business in four areas: industrial gases; welding and cutting; engineering and construction; and chemicals and related activities.

6. L'Air Liquide, at all times relevant herein, has been and is now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. BTI

7. BTI is a corporation organized and doing business under the laws of Texas, with its office and principal place of business located at 3535 West 12th Street, Houston, Texas.

8. In 1985, BTI's net sales totalled $384 million, and its total assets were approximately $1 billion.

9. BTI has worldwide operations in three product areas: industrial gas; oil field related tools, equipment and services; and welding equipment and supplies.

10. BTI, at all times relevant herein, has been and is now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in

or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION AND MERGER

11. Pursuant to an Agreement and Plan of Merger dated August 12, 1986, L'Air Liquide has offered to purchase all outstanding shares of capital stock in BTI for $29.00 per share. The parties have agreed, upon completion of the tender offer, to merge L'Air Liquide's wholly owned subsidiary, AAL Acquisition Corp., into and with BTI. The total value of the tender offer and merger is approximately $1.2 billion.

V. TRADE AND COMMERCE

12. Relevant lines of commerce in which to evaluate the effects of the acquisition and merger are the production and sale of:

(a) merchant argon; and

(b) merchant oxygen and nitrogen.

13. The United States is a relevant area in which to evaluate the effects of the acquisition and merger in the production and sale of merchant argon.

14. Relevant sections of the United States in which to evaluate the effects of the acquisition and merger on the production and sale of merchant oxygen and nitrogen are:

(a) the Southern Rocky Mountain region;
(b) West Texas;
(c) North Texas;
(d) South Texas; and
(e) Florida.

15. The production of merchant argon in the national market is highly concentrated. In terms of production, the Herfindahl-Hirschman Index ("HHI") for 1985 in the national merchant argon market was approximately 2500 and would increase approximately 125 points to approximately 2625 as a result of the acquisition and merger.

16. L'Air Liquide and BTI both are actual competitors in the production and sale of merchant argon in the national market.

17. The productive capacity of merchant oxygen and nitrogen in each relevant section of the country is highly concentrated. In terms of capacity, the HHI for 1985 in the:

(a) Southern Rocky Mountain merchant oxygen and nitrogen market was approximately 2850 and would increase approximately 1050 points to approximately 3900 as a result of the acquisition and merger;

(b) West Texas merchant oxygen and nitrogen market was approximately 2150 and would increase approximately 1300 points to approximately 3450 as a result of the acquisition and merger;

(c) North Texas merchant oxygen and nitrogen market was approximately 2350 and would increase approximately 700 points to approximately 3050 as a result of the acquisition and merger;

(d) South Texas merchant oxygen and nitrogen market was approximately 3000 and would increase approximately 450 points to approximately 3450 as a result of the acquisition and merger; and

(e) Florida merchant oxygen and nitrogen market was approximately 2600 and would increase approximately 900 points to approximately 3500 as a result of the acquisition and merger.

18. L'Air Liquide and BTI both are actual competitors in the production, distribution and sale of merchant oxygen and nitrogen in each relevant section of the country.

19. The barriers to entry into the production and sale of merchant oxygen, nitrogen and argon in the relevant sections of the country are significant. Impediments to entry arise from sunk costs, minimum efficient scale plant size, demand elasticity and market size. These factors operate together to create a situation where rapid, new entry may not be available to restrain anticompetitive activity.

VI. EFFECTS

20. The effect of the proposed acquisition and merger may be substantially to lessen competition or tend to create a monopoly in the production and sale of merchant oxygen, nitrogen, and argon in the relevant sections of the country in the following ways, among others:

(a) actual competition between L'Air Liquide and BTI in the relevant lines of commerce and relevant sections of the country will be eliminated;

(b) actual competition between competitors in the relevant lines of commerce and relevant sections of the country will be lessened;

(c) concentration in the relevant lines of commerce and relevant sections of the country will be significantly increased; and

(d) the possibility of collusion or interdependent coordination among the remaining firms in the relevant lines of commerce and relevant sections of the country will be enhanced.

VII. VIOLATIONS CHARGED

21. The effect of the acquisition and merger may be substantially to lessen competition or tend to create a monopoly in the production and sale of merchant argon in the United States market and in the production and sale of merchant oxygen and nitrogen in the Southern Rocky Mountain region, West Texas, North Texas, South Texas and

Florida markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent L'Air Liquide Societe Anonyme pour L'Etude et L'Exploitation des Procedes Georges Claude ("L'Air Liquide") is a corporation organized, existing and doing business under and by virtue of the laws of France, with its principal office located at 75 Quai d'Orsay, Paris 75321 France.

L'Air Liquide is an 88% stockholder in Liquid Air Corporation ("LAC"), a corporation organized and doing business under the laws of Delaware, with its principal office at California Plaza, 2121 North California Blvd., Walnut Creek, California.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent, and the proceedings is in the public interest.

ORDER

I.

It is hereby ordered, That as used in this order the following definitions shall apply:

1. *"L'Air Liquide"* means L'Air Liquide Societe Anonyme pour L'Etude et L'Exploitation des Procedes Georges Claude, its officers, directors, agents, representatives, employees, successors, and assigns together with all subsidiaries it controls.
2. *"Liquid Air"* means Liquid Air Corporation, its officers, directors, agents, representatives, employees, successors, and assigns together with all subsidiaries it controls.
3. *"Big Three"* means Big Three Industries Inc., its officers, directors, agents, representatives, employees, successors, and assigns together with all subsidiaries it controls.
4. *"Air separation gases"* means oxygen, nitrogen and argon in gaseous or liquid form.
5. *"Air separation gases plant"* means a facility that produces air separation gases.
6. *"Merchant air separation gases"* means oxygen, nitrogen and argon sold in liquid form or packaged in cylinders.
7. *"Merchant air separation gases producer"* means any person that is engaged in all of the following: (i) production, (ii) distribution and (iii) sale of two or more merchant air separation gases.
8. *"North Texas"* means that portion of the State of Texas within a 200 mile radius of Dallas, Texas, but does not include customers currently served by Liquid Air's Stafford or Odessa air separation gases plants.
9. *"Merchant Divestiture Assets"* means the assets described in paragraphs IIA and IIB of this order.
10. *"Material confidential information"* means competitively sensitive or proprietary information not independently known to L'Air Liquide and includes, but is not limited to, customer lists and price lists.

II.

It is further ordered, That:

A. Within 9 months from the date this order becomes final L'Air

Liquide shall divest or shall cause to be divested, absolutely and in good faith, all of its right, title and interest in the following properties. Divestiture shall be made only to a buyer or buyers, and only in a manner, that receives the prior approval of the Commission. The purpose of the divestiture is to ensure the continuation of the assets as ongoing, viable enterprises engaged in the same businesses and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint in this matter.

1. All of Liquid Air's existing merchant air separation gases customer, dealer and distributor contracts, excluding any contracts with Texas Instruments, specifying a delivery location in the state of Texas, together with associated storage vessels and cylinders;

2. Liquid Air's air separation gases plants located in Odessa, Texas and Stafford (Houston), Texas, together with associated distribution equipment, and distribution equipment sufficient to serve Liquid Air's merchant air separation gases customers located in North Texas;

3. Big Three's West Palm Beach, Florida air separation gases plant together with all associated distribution equipment, customer, dealer and distributor contracts, and associated storage vessels and cylinders;

4. Big Three's Albuquerque, New Mexico air separation gases plant, together with all associated distribution equipment, customer, dealer and distributor contracts, and associated storage vessels and cylinders;

5. Big Three's interest in the Palmer, Alaska air separation gases plant and associated merchant air separation gases customer, dealer and distributor contracts, storage vessels and distribution equipment. *Provided, however*, that if the aforementioned interest is divested to The Lincoln Electric Company, such divestiture will not require the prior approval of the Commissioner under this order.

B. L'Air Liquide shall also make available in North Texas for a period of up to 3 years from the date the divestiture of Liquid Air's existing merchant air separation gases customer, dealer and distributor contracts in North Texas is completed whether by L'Air Liquide or by the trustee identified in paragraph V, up to 50 T/D of liquid oxygen and 95 T/D of liquid nitrogen, which may be purchased by the acquirer of the merchant air separation gases customer, dealer and distributor contracts of Liquid Air in North Texas at a price equal to the electric power costs of the supplying air separation gases plant plus 5 cents/hundred cubic feet, F.O.B. the supplying plant.

C. Within 12 months from the date this order becomes final, L'Air Liquide shall enter into a contract to sell to an unrelated third party all argon to which Liquid Air is entitled under an Operating Agreement among Borden, Inc., BASF Wyandotte Corporation, Liquid Air Corporation and LAI Properties, Inc., dated December 14, 1984, as amended. Such contract shall be made only with a buyer or buyers, and only in a manner, that receives the prior approval of the Commission. The purpose of requiring such contract is to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint in this matter.

III.

It is further ordered, That, pending the divestiture of all of the assets described in paragraphs IIA and IIB, above, L'Air Liquide will hold such assets separate and apart on the following terms and conditions:

A. Within 30 days from the date this order becomes final, L'Air Liquide shall cause all of its right, title and interest in the Merchant Divestiture Assets to be transferred to a separate corporation ("Nucorp"), whose management and directors will be independent of and separate from the management and directors of L'Air Liquide, Liquid Air, or Big Three.

B. Nucorp and the Merchant Divestiture Assets shall be operated independently of L'Air Liquide, Liquid Air or Big Three.

C. L'Air Liquide shall not exercise direction or control over, or influence directly or indirectly, the day-to-day operations of Nucorp or the Merchant Divestiture Assets, except as may be necessary (i) to assure compliance with this Order, (ii) to prevent an event of default under financing arrangements to which L'Air Liquide or any of its subsidiaries is a party, or (iii) to prevent wasting or deterioration of the Merchant Divestiture Assets.

D. Except as provided in paragraph III(C)(i)-(iii) or as required by law and except to the extent that necessary information is exchanged in the course of defending litigation or negotiating agreements to dispose of Nucorp or all or any part of the Merchant Divestiture Assets, L'Air Liquide shall not receive or have access to, or the use of, any "material confidential information" relating to the Merchant Divestiture Assets not in the public domain. Any such information that is obtained pursuant to this subparagraph shall only be used for the purposes set out in this subparagraph.

E. Each transaction in the amount of $100,000 or more, or transactions in the aggregate of $500,000 or more which are not otherwise precluded to Nucorp by paragraph III(A)-(D), shall be subject to a majority vote of the Board of Nucorp. Prior to the Board of Nucorp approving any such transaction, such transaction must be submitted for review and approval by an officer of L'Air Liquide only for the limited purpose of determining whether such transaction would impair L'Air Liquide's obligations under this order, including L'Air Liquide's ability to divest Nucorp or the Merchant Divestiture Assets, or would create an event of default under any financing arrangement. The submission of such proposed transactions to an executive of L'Air Liquide shall be made in writing only, and L'Air Liquide's response shall also be in writing only, and copies of all such writings shall be maintained by L'Air Liquide for two years following the divestiture of the Merchant Divestiture Assets. The approval of an officer of L'Air Liquide shall not be unreasonably withheld and shall be granted within a reasonable period of time.

F. Subject to the other provisions of this order:

1. L'Air Liquide shall have the sole right to determine the terms of sale of Nucorp or any of the Merchant Divestiture Assets, including timing of sale and purchase price, and to cause Nucorp management to enter into any agreements or arrangements, or to take any other action, to fulfill L'Air Liquide's obligations under this order, and

2. In the event L'Air Liquide has submitted one or more acquirers of the Merchant Divestiture Assets or of Nucorp to the Commission prior to the date this order becomes final, L'Air Liquide will not be required to cause those assets for which it has a contract or contracts to sell to be transferred to Nucorp, unless and until the Commission denies approval of such acquirers. If the Commission denies such approval, L'Air Liquide shall transfer the Merchant Divestiture Assets to Nucorp (a) within ten (10) calendar days, or (b) if L'Air Liquide has not as yet transferred assets to Nucorp pursuant to paragraph III(A), then L'Air Liquide shall be required to transfer the Merchant Divestiture Assets described in this subparagraph in accordance with paragraph III(A).

IV.

It is further ordered, That L'Air Liquide shall not cause or permit the wasting or deterioration of the assets and operations to be divested in accordance with paragraph II of this order in any manner that impairs the marketability of any such assets and operations or impairs in any manner the viability of the assets and operations as a going concern engaged in the production, sale or distribution of industrial gases. *Provided, however,* that deterioration in the ordinary course of operation and normal wear is not a violation of this paragraph.

V.

It is further ordered, That:

A. If L'Air Liquide has not divested all of the Merchant Divestiture Assets within the 9-month period, or has not obtained approval for the contract described in paragraph II(C) within the 12 month period, L'Air Liquide shall consent to the appointment of a trustee in any action that the Federal Trade Commission may bring pursuant to Section 5(*1*) of the Federal Trade Commission Act, 15 U.S.C. 45 (*1*), or any other statute enforced by the Commission. In the event the court declines to appoint a trustee, L'Air Liquide shall consent to the appointment of a trustee by the Commission pursuant to the order.

B. If a trustee is appointed by a court or the Commission pursuant to paragraph V(A) of the order, L'Air Liquide shall consent to the following terms and conditions regarding the trustee's duties and responsibilities:

1. The Commission shall select the trustee, subject to L'Air Liquide's consent, which shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall have 18 months from the date of appointment to submit for prior approval the divestiture of any undivested assets, which shall be subject to the prior approval of the Commission, and if the trustee was appointed by the court, subject also to the prior approval of the court. If, however, at the end of the 18-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission or by the court, if the trustee was appointed by a court.

3. The trustee shall have full and complete access to the personnel, books, records, and facilities relating to any undivested assets and Nucorp or L'Air Liquide shall develop such financial or other information relevant to the assets to be divested as such trustee may reasonably request. Nucorp and L'Air Liquide shall cooperate with the trustee and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

4. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with the order's absolute and unconditional obligation to divest.

5. The trustee shall serve at the cost and expense of L'Air Liquide on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall account for all monies derived from asset sales and all expenses incurred. After approval by

the court or the Commission of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to L'Air Liquide and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting undivested assets.

6. Promptly upon appointment of the trustee, L'Air Liquide shall, subject to the Commission's prior approval and consistent with provisions of this order, execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to cause divestiture of undivested assets.

7. If the trustee ceases to act or fails to act diligently, the court or the Commission may, upon its own motion or by motion of L'Air Liquide, appoint a substitute trustee for the balance of the 18-month period specified in paragraph V(B)(2) or any extension thereof.

8. The trustee shall report in writing to L'Air Liquide and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

9. The trustee shall be authorized to retain independent legal counsel and other persons for purposes of discharging the functions set forth above. L'Air Liquide shall reimburse the trustee for the reasonable value of all expenses so incurred.

10. If L'Air Liquide and the trustee are unable to resolve a dispute regarding the reasonable value of his/her services or the reasonableness of an expenditure or obligation incurred by the trustee in connection with his/her efforts to divest the plant or plants, then L'Air Liquide and the trustee shall submit the dispute to the Commission for resolution. The trust agreement shall recite that the Commission's determination of the reasonable value of the trustee's services or the reasonableness of expenditures and other obligations incurred by the trustee shall be binding upon L'Air Liquide and the trustee.

VI.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until L'Air Liquide has fully complied with the provisions of paragraphs II(A)-II(C) of this order, L'Air Liquide shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying or has complied with those provisions. L'Air Liquide shall include in compliance reports, among other things that are required from time to time, a full description of contacts or negotiations for divestiture, including the identity of all parties contacted.

VII.

It is further ordered, That for a period commencing on the date this order becomes final and continuing for ten (10) years from and after the date this order becomes final, L'Air Liquide shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock or share capital of any United States merchant air separation gases producer, or any of the merchant air separation gases assets of any United States merchant air separation gases producer, provided, however, that nothing in this order shall require L'Air Liquide to obtain prior Commission approval for acquisitions of (a) gas or any product for resale, (b) transportation, delivery or storage equipment, (c) cylinders, (d) converters, (e) bulk customer stations, or (f) plant equipment not incorporated in an operating merchant air separation gases plant, and provided further that nothing in this order or in the Commission's order entered in Docket C-2990 shall require L'Air Liquide to obtain prior Commission approval if L'Air Liquide increases its ownership in Liquid Air or causes Big Three to acquire Liquid Air. One year after the date this order becomes final, and annually thereafter, L'Air Liquide shall file with the Commission a verified written report of its compliance with this paragraph.

VIII.

It is further ordered, That for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to L'Air Liquide made to its principal office, L'Air Liquide shall permit any duly authorized representatives of the Commission access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of L'Air Liquide relating to any matters contained in this order.

IX.

It is further ordered, That L'Air Liquide shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of the order.

DISSENTING STATEMENT OF CHAIRMAN DANIEL OLIVER

I would support a consent order in this matter that required the respondent—for a prescribed period of years—to furnish prior *notice* to the Commission before making additional acquisitions in the markets at issue. Unfortunately, the consent order the Commission has accepted requires the respondent—for ten years—to secure prior Commission *approval* before making acquisitions in those markets. The Commission has recently determined that the appropriateness of prior approval provisions depends on "industry market structure and market conditions."[1] I do not support imposing the prior approval requirement in the consent order because it is not clear from the record that "market conditions and market structure in [the covered markets] are such that all such acquisitions . . . necessarily [would be] anticompetitive."[2] I therefore respectfully dissent from final acceptance of the consent order in this matter.

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[1] *American Medical International*, 104 FTC 1, 224 (1984); *accord*, *Hospital Corp. of America*, 106 FTC 361, 514 (1985), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, ... U.S. ..., No. 86-1492 (May 3, 1987).

[2] *See American Medical International*, 104 FTC at 225; *see also Hospital Corp. of America*, 106 FTC at 513-17.

IN THE MATTER OF

TICOR TITLE INSURANCE COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9190. Complaint, Jan. 7, 1985—Decision, July 30, 1987

This consent order prohibits, among other things, Santa Ana, Calif.-based respondent, First American Title Insurance Co., from setting any rates for title search and examination and settlement services through any rating bureau in six states. Additionally, First American Title Insurance Co. agreed to withdraw from the law suit filed by the title insurance companies named in the 1985 complaint and requires the respondent to notify the Commission at least thirty days prior to any changes in the corporate respondent.

Appearances

For the Commission: *Michael Antalics.*

For the respondents: *Paul J. Laveroni, Frank D. Tatum, & Karen J. Kubin, Cooley, Godward, Castro, Huddleson & Tatum,* San Francisco, Calif.

COMPLAINT*

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

DEFINITIONS

PARAGRAPH 1. The following definitions shall apply in this complaint:

a. *"Title search and examination services"* means all activities which are designed to identify and describe the ownership of a particular parcel of real property as well as any other actual or potential rights to, encumbrances on, or interests in the property.

b. *"Settlement services"* means those services related to the closing of a real estate transaction, including but not limited to those services performed in connection with or in supervision of the execution, delivery or recording of transfer and lien documents, or the disbursement of funds.

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* The Decision and Order following this Complaint applies to respondent First American Title Insurance Company only. The Complaint against the other named respondents remains in litigation.

RESPONDENTS

PAR. 2. Respondent Ticor Title Insurance Company is a corporation organized under the laws of the State of California, with its principal place of business at 6300 Wilshire Boulevard, Los Angeles, California.

PAR. 3. Respondent Chicago Title Insurance Company is a corporation organized under the laws of the State of Missouri, with its principal place of business at 111 W. Washington Street, Chicago, Illinois.

PAR. 4. Respondent Safeco Title Insurance Company is a corporation organized under the laws of the State of California, with its principal place of business at 13640 Roscoe Boulevard, Los Angeles, California.

PAR. 5. Respondent First American Title Insurance Company is a corporation organized under the laws of the State of California, with its principal place of business at 114 East 5th Street, Santa Ana, California.

PAR. 6. Respondent Lawyers Title Insurance Corporation is a corporation organized under the laws of the Commonwealth of Virginia, with its principal place of business at 6630 West Broad Street, Richmond, Virginia.

PAR. 7. Respondent Stewart Title Guaranty Company is a corporation organized under the laws of the State of Texas, with its principal offices at Stewart Building, Galveston, Texas.

JURISDICTION

PAR. 8. Respondents maintain, and have maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce within the meaning of the Federal Trade Commission Act.

PAR. 9. Title search and examination services do not constitute the "business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. 1012(b).

PAR. 10. Settlement services do not constitute the "business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. 1012(b).

ANTICOMPETITIVE ACTS AND PRACTICES

PAR. 11. Respondents have agreed on the prices to be charged for title search and examination services or settlement services through rating bureaus in various states. Examples of states in which one or more of the respondents have fixed prices with other respondents or other competitors for all or part of their search and examination services or settlement services are Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin and Wyoming.

ANTICOMPETITIVE EFFECTS

PAR. 12. As a result of the aforesaid acts and practices, competition in the sale of title search and examination services or settlement services has been restrained in various states.

PAR. 13. The aforesaid acts and practices therefore constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent First American Title Insurance Company with violation of Section 5 of the Federal Trade Commission Act, as amended, and respondent having been served with a copy of the complaint, together with a notice of contemplated relief; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication as to respondent First American Title Insurance Company in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent First American Title Insurance Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 114 East 5th Street, Santa Ana, California.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

For purposes of this order, the following definition shall apply:
"*Affected States*" means the states of Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin.

II.

It is ordered, That respondent, its successors and assigns, and its officers, representatives, and employees, directly or indirectly, through any corporation, subsidiary, division or other device shall not discuss, propose, set, or file any rates for title search and examination services or settlement services through any rating bureau in any of the Affected States, unless respondent can establish that such state has clearly articulated and affirmatively expressed a policy permitting collective rate filing through rating bureaus, and actively supervises this conduct.

III.

It is further ordered, That respondent shall within thirty days after service of this order deliver a copy of this order to all its present officers, directors, and personnel having any responsibility in determining rates as well as to the commissioner of insurance in each of the Affected States.

IV.

It is further ordered, That respondent notify the Commission at least thirty days prior to any change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

V.

It is further ordered, That respondent shall, within ninety days after the order becomes final, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

BUCKINGHAM PRODUCTIONS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 & 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9194. Amended Complaint, July 30, 1987—Decision, July 30, 1987

This consent order requires, among other things, the Furlong, Pa. marketers of mail-order weight reduction or weight control products, programs or services to cease falsely representing the effectiveness of its programs, products or services without competent and reliable evidence supporting such claims.

Appearances

For the Commission: *Michael Dershowitz.*

For the respondents: *John J. Hare, Jr., Buckingham Commons,* Furlong, PA.

AMENDED COMPLAINT*

The Federal Trade Commission, having reason to believe that Buckingham Productions, Inc., trading and doing business as Rotation Diet Center; Furlong-Elliot Corp.; Freedom Center, Inc.; Plaza Business Services, Inc.; N.F. Rotation, Inc.; Rotation-Freedom Diet, Inc., Health and Diet Corp., Inc., corporations; Howard Elliot, individually and as an officer of said corporations, ("respondents"); and Dr. Barry Bricklin, individually, ("expert respondent") have violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1.

(a) Buckingham Productions, Inc., trading and doing business as Rotation Diet Center, 73 Valley Drive, Furlong, Pennsylvania; Furlong-Elliot Corp., 73 Valley Drive, Furlong, Pennsylvania; Freedom Center, Inc., 73 Valley Drive, Furlong, Pennsylvania; Plaza Business Services, Inc., 73 Valley Drive, Furlong, Pennsylvania; N.F. Rotation, Inc., 73 Valley Drive, Furlong, Pennsylvania; and Rotation-Freedom Diet, Inc., 73 Valley Drive, Furlong, Pennsylvania; and Health and Diet Corp., Inc., 73 Valley Drive, Furlong, Pennsylvania are Pennsylvania corporations.

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* Complaint issued June 24, 1985. Published at 106 F.T.C. 115 (1985).

(b) Furlong-Elliot Corp. dominates and controls the acts and practices of its wholly-owned subsidiaries, Buckingham Productions, Inc.; Freedom Center, Inc.; Plaza Business Services, Inc.; N.F. Rotation, Inc.; and Rotation-Freedom Diet, Inc.

(c) Howard Elliot is an officer of Furlong-Elliot Corp. Howard Elliot formulates, directs and controls the acts and practices of the corporate respondents, including the acts and practices alleged in this complaint. His address is 73 Valley Drive, Furlong, Pennsylvania.

(d) Dr. Barry Bricklin is a clinical psychologist, with a doctor of philosophy degree in psychology, and a license to practice psychology in Pennsylvania. He is now and at all material times has been an associate professor of clinical psychology at Hahnemann University. His address is 470 General Washington Road, Wayne, Pennsylvania. Expert respondent Bricklin possesses an expertise in psychology, and in the physiological and psychological aspects of dieting, superior to that generally acquired by ordinary individuals.

PAR. 2. Respondents manufacture, offer for sale, and sell weight reduction and/or weight control programs and products. Expert respondent Dr. Barry Bricklin, for his part, developed some of the basic principles upon which the weight reduction and/or weight control programs offered for sale through the corporate respondents are based. Expert respondent Bricklin has had a continuing role in the marketing of these programs by serving as the Director of the programs' Professional Advisory Board, and by providing advice concerning the products and programs to Howard Elliot, to other respondents, and/or to employees of the respondents as requested. In addition, expert respondent Bricklin has aided in the promotion and sale of these weight reduction and/or weight control programs and products by providing as an expert in the field endorsements of the efficacy of the programs and products that appear in advertisements. The advertisements in which expert respondent Bricklin's endorsements appear depict him as possessing an expertise in psychology, and in the physiological and psychological aspects of dieting, superior to that generally acquired by ordinary individuals.

PAR. 3. Respondents have disseminated or caused to be disseminated, advertisements for weight reduction and/or weight control programs and products that include a "food" and/or a "drug" within the meaning of these terms in Section 12 of the Federal Trade Commission Act. These advertisements, some of which contain expert respondent Dr. Barry Bricklin's endorsement, have been disseminated (a) by United States mails, or in or having an effect upon commerce by any means for the purpose of inducing, or which have been likely to induce, directly or indirectly, the purchase of food and/or drugs, or (b) by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food and/or drugs.

PAR. 4. The acts and practices of respondents and expert respondent Dr. Barry Bricklin alleged in this complaint have been in or affecting commerce.

PAR. 5. Typical of respondents' advertisements, but not necessarily inclusive thereof, are the advertisements attached hereto as Exhibits A through L. Specifically, the aforesaid advertisements contain the following statements:

(a) "Women usually lose 8 to 20 pounds a month, men 12 to 25 pounds [on the Rotation Diet]."

(b) "[. . . The] 'No Frills' Rotation Diet Plan . . . works just like the original Plan. It's just as safe, just as effective. . . ."

(c) "Now you can truly eat whatever you want, as much as you want without feeling guilty and you'll still lose weight."

(d) "The all natural diet—no drugs or medicine! The Rotation Diet is really SANE and PROVEN SAFE!"

(e) "My total loss so far has been 62 pounds . . . There are thousands of Rotation Diet Center Members who've lost as much weight as I have. Even more!"

(f) "Reach your goal then keep it off with the Rotation Diet Maintenance Plan."

(g) ". . . [R]eal breakthrough [of the Rotation Diet] is the unique way it allows a person to find his or her right weight and then stay there."

(h) "Once you reach your weight goal, you only diet two days each week. Then as your body adjusts to its new weight, you diet just one day a week. You'll be able to stay slim all your life . . . comfortably and easily."

(i) "Q. What do the [Rotation] tablets do?

A. They stop all hunger and increase your energy level."

(j) "Rotation Wafers makes (sic) the diet work. They're critical to the success of the diet because they: STOP HUNGER (yet they're not a medicine, drug, or shot, so they're perfectly safe) . . . ELIMINATE FATIGUE. . . ."

(k) "Take-A-Break Tablets are specially formulated to work with the Rotation Diet and help to keep food from turning to fat. This means that for one day, two days, any number up to 15 days, you can enjoy taking a break from your Rotation Diet. Soon as you . . . get back on the Rotation Diet . . . in one week or less you'll be back at your 'Pre-Break' weight."

(l) "[I]t saves you more than it costs. . . . *You'll save more than you spend on this diet!* Most people cut about 40% off their food bill because they've cut down on expensive foods during their three Balance Days a week."

(m) "Q. How much weight can I really lose on the FREEDOM DIET?

A. . . . [A]s a rule, women usually lose anywhere from 8 to 20 pounds the first month; men up to 25 pounds."

(n) "The Freedom Chewable Tablets are the key to your weight-loss success. They contain no medicine or drugs, yet they stop hunger and help you to feel good on your diet day."

(o) "Q. Can the FREEDOM DIET harm me in any way?

A. No. Our experience is that the diet when followed accurately, takes off weight safely and naturally."

(p) "After You Reach Your Goal, It's Easy to Maintain. Once you've lost all the weight you want, it's easy to keep it off because FREEDOM DIET has a special Maintenance Program. You'll reduce your Diet Days to 2 per week . . . then as your system adjusts to your new weight, you'll cut back to just 1 diet day per week and you'll be able to stay slim for the rest of your life!"

(q) "Here's how the FREEDOM DIET works: This amazing diet actually let you eat and drink what and whenever you want on TUESDAYS, THURSDAYS, SATURDAYS AND SUNDAYS. You can have foods like spaghetti, ravioli, fettucini, and pizza. Bread and potatoes too. And desserts like chocolate layer cake, ice cream, banana splits, sundaes, pecan pie with whipped cream—whatever your favorites might be! You can even have double helpings of everything because that's the whole idea of the FREEDOM DIET. You're FREE to eat anything you want, as much as you want 4 days every week."

(r) "Our 'Make-A-Break' Plan will help you maintain your weight for up to 15 days when you have to take a break from FREEDOM DIET."

(s) "[T]he majority of women [on the Rotation-Freedom Diet] fit within range of 8 to 20 pounds loss during the first month, men usually lose more."

(t) "Take-A-Break Tablets [in the Rotation-Freedom Diet] let you go off your diet for 9 days without regaining."

PAR. 6. Typical of the statements in endorsements authorized by expert respondent Dr. Barry Bricklin, which appear in respondents' advertisements, and are attached hereto as Exhibits A and I, are the following:

"Q. Does the Rotation Diet really work? Do people lose weight on it?

A. It works extremely well. But as any doctor with years of experience in weight control knows, designing a way to lose weight is only a small part of the challenge. My years of observation of this diet convince me that its real breakthrough is the unique way it allows a person to find his or her right weight and then stay there. . . .

Q. How much weight can I lose?

A. Women usually lose 8 to 20 pounds a month, men 12 to 25 pounds. The amount depends on many personal variables, including the total amount of weight you have to lose. . . ."

PAR. 7. Respondents' advertisements also contain the following statements, which purport to be actual and genuine testimonials from customers of the Rotation Diet Center:

(a) " 'The Rotation Tablets taste like Necco Wafers. They really stop my hunger and increase my energy level. I feel good on my 3 diet days!" E.R., Boston, Massachusetts"

(b) " 'I really pig-out on my free days—pizza, cheesecake, beer, potato chips. I eat to my 'heart's content' and have still lost 57 pounds!' N.M., Princeton, New Jersey"

(c) " 'I save enough on my 3 diet days to more then pay for the whole week. The diet actually costs me nothing!' J.A., Stowe, Ohio"

(d) " 'The all natural diet—no drugs or medicine! The Rotation Diet is really SANE and PROVEN SAFE!' C.D., Wilmington, DE"

(e) " 'I just used your switching process to make Wednesday a FREE DAY—it worked great!' A.Z., Hartford, CT"

(f) " 'I've been on maintenance for 6 months and it's working great! I now have only ONE diet day each week.' S.R., Los Angeles, CA"

(g) " 'I've lost over 70 pounds while eating all of the ice cream that I want 4 days every week. THIS IS THE MOST SUCCESSFUL DIET EVER!' P.A., Philadelphia, PA"

(h) " 'I've lost over 70 pounds while eating all of the ice cream I want 4 days every week. THIS IS THE MOST SUCCESSFUL DIET EVER!' D.C., Norristown, PA"

PAR. 8. Respondents' advertisements also contain photographs of individuals accompanied by the following statements:

(a) " 'I'm Dottie Woolslager. I'm thin for the first time since the kids came, and I know I'll never be fat again. I found the Rotation Diet, the only diet I've ever been able to live with. . . .' "

" 'I'm so pleased about what happened to me, I'd love to help it happen to you. . . .' "

" 'I'm beginning to feel like a celebrity. Hundreds of people have been calling me personally, asking, 'Why did you pick the Rotation Diet?'. . . . They had read about me and The Rotation Diet, and seen how successful I was. But they weren't sure they could actually do it themselves.

That's why I volunteered to let The Rotation Diet Center relay calls to my home. I want to help spread the word about this wonderful diet. . . .

P.S. I'm no celebrity. I'm someone exactly like you, who's just a few months ahead of you on the Rotation Diet Program. . . .' "

(b) " 'I'm Judy Ruthrauff. After the birth of my last little girl, I couldn't get rid of 23 pounds. I was always hungry, and I ate enormous amounts of diet food until I discovered The Rotation Diet. It really worked for me. It not only got the weight off, it got me feeling good about myself again.' "

PAR. 9. Through the use of the statements referred to in paragraphs five and seven, and other statements in advertisements not specifically set forth herein, respondents have made the following material representations, directly or by implication:

(a) Consumers can eat unlimited quantities of food four days a week and, regardless of how much they eat on those four days, still lose substantial amounts of weight on the Rotation Diet, the Freedom Diet, and the Rotation-Freedom Diet.

(b) Thousands of consumers on the Rotation Diet have lost sixty-two pounds or more.

(c) Rotation Diet Wafers, Rotation Chewable Tablets, and Freedom Chewable Tablets stop hunger.

(d) Rotation Diet Wafers, Rotation Chewable Tablets, and Freedom Chewable Tablets eliminate or prevent fatigue.

(e) Rotation Diet "Take-A-Break" tablets help keep food from turning to fat.

(f) The testimonials in paragraph seven represent actual and genuine consumer testimonials from customers of the Rotation Diet Center.

PAR. 10. Through the use of the endorsements authorized by expert respondent Dr. Barry Bricklin, referred to in paragraph six, and other endorsements in respondents' advertisements not specifically set forth herein, expert respondent Bricklin has made the following material representation, directly or by implication:

Consumers can eat unlimited quantities of food four days a week and, regardless of how much they eat on those four days, still lose substantial amounts of weight on the Rotation Diet, the Freedom Diet, and the Rotation-Freedom Diet.

PAR. 11. In truth and in fact:

(a) Consumers cannot eat unlimited quantities of food four days a week and regardless of how much they eat on those four days, still lose substantial amounts of weight on the Rotation Diet, the Freedom Diet, and the Rotation-Freedom Diet.

(b) Only a small number of consumers on the Rotation Diet have lost sixty-two pounds or more.

(c) Rotation Diet Wafers, Rotation Chewable Tablets, and Freedom Chewable Tablets do not stop hunger.

(d) Rotation Diet Wafers, Rotation Chewable Tablets, and Freedom Chewable Tablets do not eliminate or prevent fatigue.

(e) Rotation Diet "Take-A-Break" Tablets do not help keep food from turning to fat.

(f) The testimonials in paragraph seven do not represent actual and genuine consumer testimonials from customers of the Rotations Diet Center.

Therefore, the representations set forth in paragraph nine were, and are, false and misleading.

And therefore, the representation contained in endorsements authorized by expert respondent Dr. Barry Bricklin, set forth in paragraph ten was, and is, false and misleading and expert respondent Bricklin knew or should have known that said representation was, and is, false and misleading.

PAR. 12. Through their use of the photographs and statements referred to in paragraph eight, and others not specifically set forth herein, respondents have represented that the photographed individuals are satisfied users of the Rotation Diet and have endorsed the Rotation Diet, but respondents failed to disclose that the photographed individuals were employees of respondents. Consumers would not reasonably expect individuals so portrayed to be employees of the advertiser and that fact might materially affect the weight or credibility given to the endorsements. Therefore, respondents' representations, because of their failure to disclose such a material connection between respondents and the photographed individuals was, and is, false and misleading.

PAR. 13. Through the use of the statements referred to in paragraphs five and seven, and other statements in advertisements not specifically set forth herein, respondents have represented, directly or by implication, that:

(a) Usual weight loss for women customers of the Rotation Diet is eight to twenty pounds per month, and for men is twelve to twenty-five pounds per month.

(b) Usual first month weight loss for women customers of the Freedom Diet is eight to twenty pounds. A significant portion of men lose twenty-five pounds the first month on the Freedom Diet.

(c) The Rotation Diet is safe.

(d) The Freedom Diet cannot harm consumers.

(e) The Rotation Diet, the Freedom Diet, and the Rotation-Freedom Diet include maintenance programs that are effective in enabling consumers to maintain weight loss.

(f) Consumers on the Rotation Diet "Take-A-Break" plan can cease dieting for 15 days and after one week back on the diet, will have lost all weight gained during those 15 days.

(g) Consumers on the Freedom Diet "Make-A-Break" Plan can maintain their weight for up to fifteen days without any dietary restrictions and regardless of the type and quantity of food consumed.

(h) The Rotation Diet saves consumers more than it costs.

(i) Most Rotation Diet customers save approximately 40% on their food bill.

(j) Most women customers of the Rotation-Freedom Diet lose eight to twenty pounds the first month on the diet, while most men lose even more.

(k) Customers on the Rotation-Freedom Diet "Take-A-Break" plan can cease dieting for nine days and can maintain their prior weight without any dietary restrictions and regardless of the type and quantity of food consumed.

(l) The majority of women customers of the Rotation-Freedom Diet lose eight to twenty pounds the first month on the diet; men usually lose more.

PAR. 14. Through the use of the endorsements authorized by expert respondent Dr. Barry Bricklin, referred to in paragraph six, and other endorsements in respondents' advertisements not specifically set forth herein, expert respondent Bricklin has made the following representation, directly or by implication:

Usual weight loss for women customers of the Rotation Diet is eight to twenty pounds per month, and for men is twelve to twenty-five pounds per month.

PAR. 15. Through the use of the statements set forth in paragraphs five and seven, and others not specifically set forth herein, respondents have represented, directly or by implication, that at the time of making the representations set forth in paragraphs nine and thirteen they possessed and relied upon a reasonable basis for those representations.

PAR. 16. Through the use of the endorsements authorized by expert respondent Dr. Barry Bricklin, set forth in paragraph six, and other endorsements in respondents' advertising not specifically set forth herein, expert respondent Bricklin has represented, directly or by implication, that at the time of making the representations set forth in paragraphs ten and fourteen he possessed and relied upon a reasonable basis for those representations, consisting of an actual exercise of his expertise in evaluating weight reduction and/or weight control programs and products with respect to which he is expert, in the form of an examination or testing of the programs and products at least as extensive as someone with a similar degree of expertise would normally conduct in order to support the conclusions presented in the endorsement.

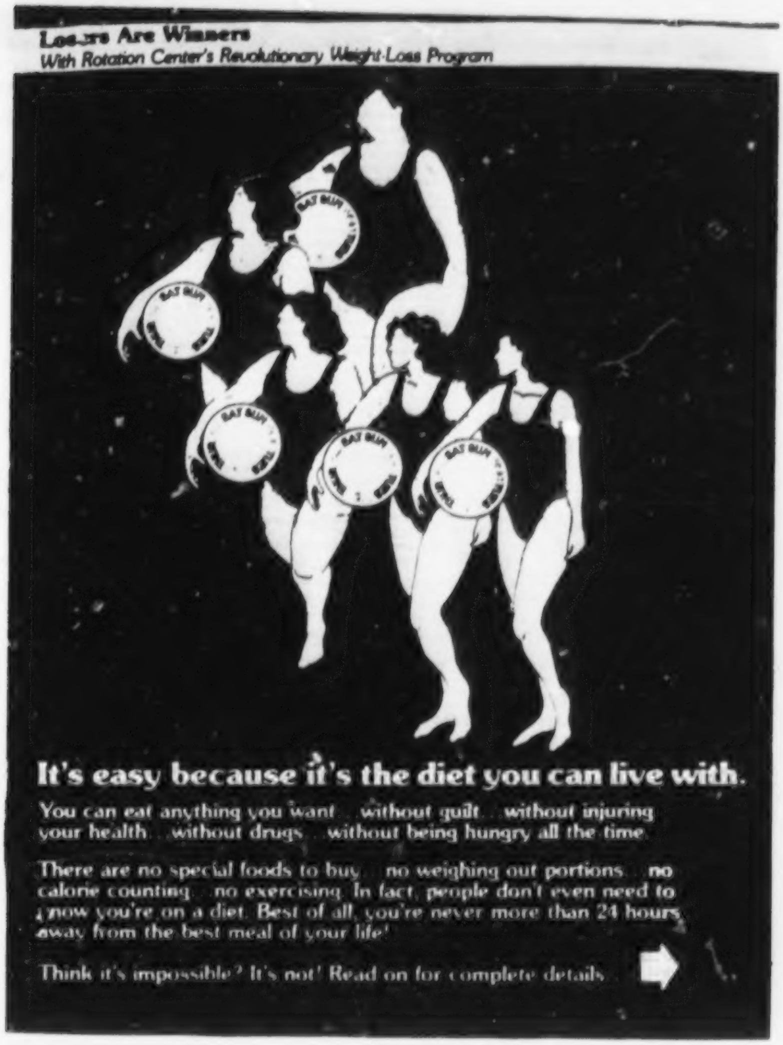
PAR. 17. In truth and in fact, at the time of the initial dissemination of the representations set forth in paragraphs nine and thirteen and each subsequent dissemination, respondents did not possess and rely upon a reasonable basis for making such representations. Therefore, respondents' representations, as set forth in paragraph fifteen were, and are, false and misleading.

PAR. 18. In truth and in fact, at the time of the initial dissemination of the representations set forth in paragraphs ten and fourteen and each subsequent dissemination, expert respondent Dr. Barry Bricklin did not possess and rely upon a reasonable basis for making such representations. Therefore, expert respondent Bricklin's representations, as set forth in paragraph sixteen were, and are, false and misleading.

PAR. 19. Expert respondent Dr. Barry Bricklin has received compensation for the use of his endorsements in respondents' advertisements for weight reduction and/or weight control programs and products.

PAR. 20. The acts or practices of respondents and expert respondent Dr. Barry Bricklin as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce and false advertisements and endorsements in violation of Sections 5 and 12 of the Federal Trade Commission Act.

EXHIBIT A



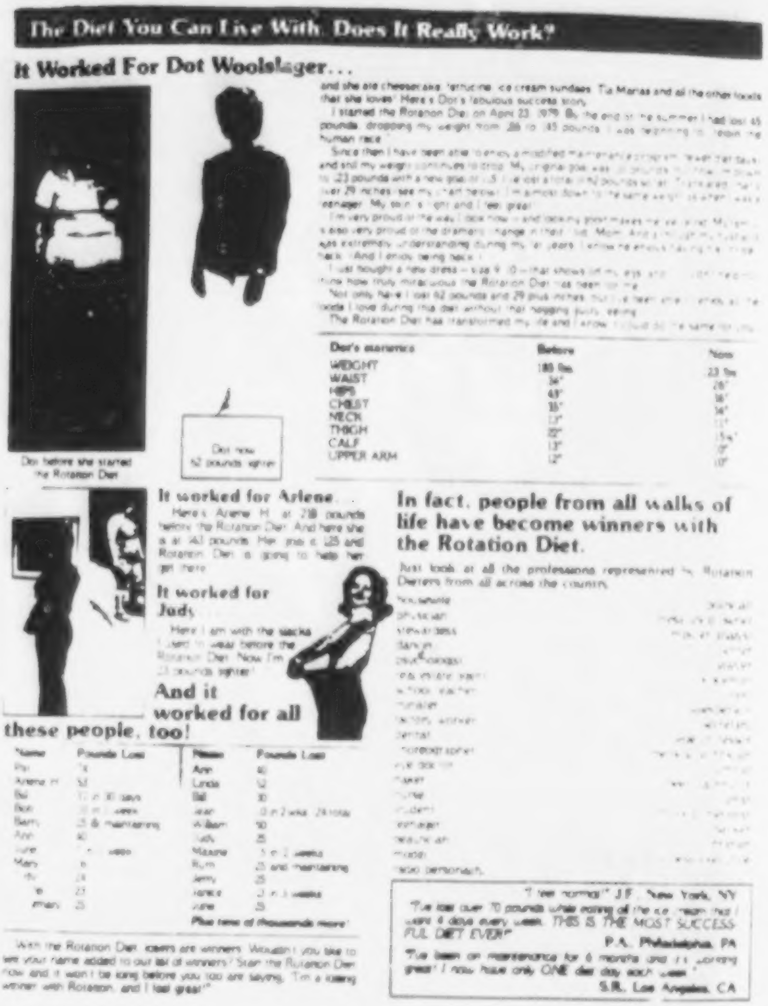
Losers Are Winners
With Rotation Center's Revolutionary Weight-Loss Program

It's easy because it's the diet you can live with.

You can eat anything you want . . . without guilt . . . without injuring your health . . . without drugs . . . without being hungry all the time.

There are no special foods to buy . . . no weighing out portions . . . no calorie counting . . . no exercising. In fact, people don't even need to know you're on a diet. Best of all, you're never more than 24 hours away from the best meal of your life!

Think it's impossible? It's not! Read on for complete details . . .



The Diet You Can Live With. Does It Really Work?

It Worked For Dot Woolslager...

and she ate cheesecake, fettucine, ice cream sundaes, Tia Marias and all the other foods that she loves! Here's Dot's fabulous success story.

"I started the Rotation Diet on April 23, 1979. By the end of the summer I had lost 45 pounds, dropping my weight from [illegible] to [illegible] pounds. I was beginning to rejoin the human race."

"Since then I have been able to enjoy a modified maintenance program [illegible] and still my weight continues to drop. My original goal was [illegible] pounds [illegible] to 123 pounds with a new goal of 115. I've lost a total of 62 pounds so far. [illegible] over 29 inches (see my chart below). I'm almost down to the same weight as when I was a teenager. My skin is tight and I feel great!

"I'm very proud of the way I look now — and looking my best makes me feel great. My family is also very proud of the dramatic change in their 'old' Mom. And [illegible] my husband was extremely understanding during my fat years, I know he enjoys having me [illegible] back. (And I enjoy being back!)

"I just bought a new dress — size 9/10 — that shows off my legs and [illegible] how truly miraculous the Rotation Diet has been for me.

"Not only have I lost 62 pounds and 29 plus inches, but I've been able to [illegible] all the foods I love during this diet without that nagging guilty feeling.

"The Rotation Diet has transformed my life and I know [illegible]

Dot's statistics	Before	Now
WEIGHT	185 lbs.	123 lbs.
WAIST	34"	26"
HIPS	43"	36"
CHEST	35"	34"
NECK	13"	11"
THIGH	22"	15¼"
CALF	13"	[illegible]
UPPER ARM	12"	10"

Dot before she started the Rotation Diet

Dot now 62 pounds lighter

It worked for Arlene...

Here's Arlene H. at 218 pounds before the Rotation Diet. And here she is at 163 pounds. Her goal is 125 and Rotation Diet is going to help her get there.

It worked for Judy...

Here I am with the slacks I used to wear before the Rotation Diet. Now I'm 25 pounds lighter!

And it worked for all these people, too!

Name	Pounds Lost	Name	Pounds Lost
Pat	78	Ann	40
Arlene H.	52	Linda	52
Bill	17 in 30 days	Bill	30
Bob	10 in 3 weeks	Jean	10 in 2 wks., 24 total
Barry	25 & maintaining	William	50
Ann	40	Judy	25
June	[illegible] weeks	Maxine	5 in 2 weeks
Mary	[illegible]	Ruth	25 and maintaining
[illegible]	24	Jerry	25
[illegible]	23	Janice	10 in 3 weeks
[illegible]	25	June	25
		Plus tens of thousands more!	

With the Rotation Diet, losers are winners. Wouldn't you like to see your name added to our list of winners? Start the Rotation Diet now and it won't be long before you too are saying, "I'm a losing winner with Rotation, and I feel great!"

In fact, people from all walks of life have become winners with the Rotation Diet.

Just look at all the professions represented by Rotation Dieters from all across the country.

housewife
physician
stewardess
dancer
psychologist
real estate agent
school teacher
minister
factory worker
dental [illegible]
[illegible]
eye doctor
baker
nurse
student
teenager
beautician
model
radio personality

[illegible]

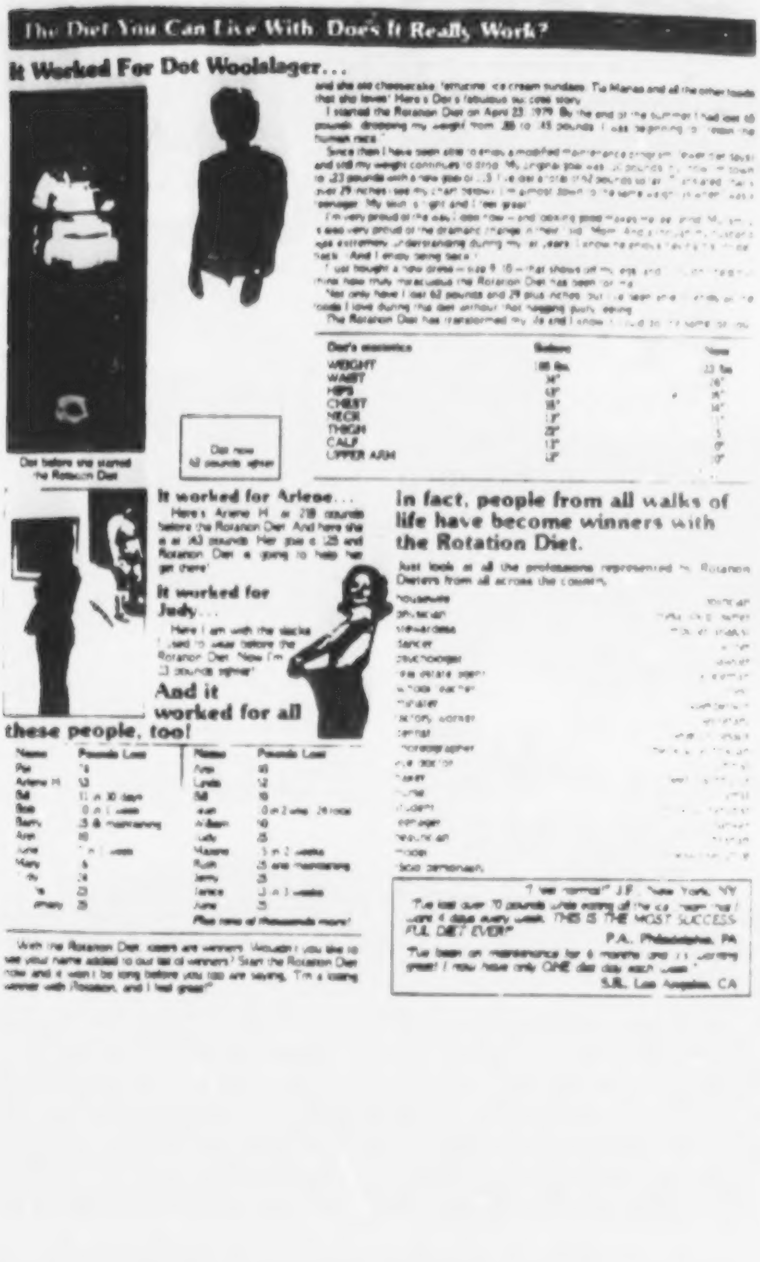
"I feel normal!" J.F., New York, NY

"I've lost over 70 pounds while eating all the ice cream that I want 4 days every week. THIS IS THE MOST SUCCESSFUL DIET EVER!"

P.A., Philadelphia, PA

"I've been on maintenance for 6 months and it's working great! I now have only ONE diet day each week."

S.R., Los Angeles, CA



The Diet You Can Live With. Does It Really Work?

It Worked For Dot Woolslager...

and she ate cheesecake, fettucine, ice cream sundaes, Tia Marias and all the other foods that she loves! Here's Dot's fabulous success story.

"I started the Rotation Diet on April 23, 1979. By the end of the summer I had lost 45 pounds, dropping my weight from 185 to 143 pounds. I was beginning to rejoin the human race."

Since then I have been able to enjoy a modified maintenance program (lower diet days) and still my weight continues to drop. My original goal was [illegible] pounds. I'm now down to 123 pounds with a new goal of [illegible]. I've lost a total of 62 pounds so far. I've shaved off over 29 inches (see my chart below). I'm almost down to the same weight as when I was a teenager. My skin is tight and I feel great!

I'm very proud of the way I look now — and looking good makes me feel good. My family is also very proud of the dramatic change in their "old" Mom. And although my husband was extremely understanding during my fat years, I know he enjoys having his "bride" back. And I enjoy being back!

I just bought a new dress — size 9/10 — that shows off my legs and [illegible] how truly miraculous the Rotation Diet has been for me.

Not only have I lost 62 pounds and 29 plus inches, but I've been able to enjoy all the foods I love during this diet without that nagging guilty feeling.

The Rotation Diet has transformed my life and I know it could do the same for you.

Dot's statistics	Before	Now
WEIGHT	185 lbs.	123 lbs.
WAIST	34"	26"
HIPS	43"	35"
CHEST	38"	34"
NECK	13"	11"
THIGH	22"	[illegible]
CALF	13"	9"
UPPER ARM	12"	10"

Dot before she started the Rotation Diet

Dot now 62 pounds lighter

It worked for Arlene...

Here's Arlene H. at 218 pounds before the Rotation Diet. And here she is at 163 pounds. Her goal is 125 and Rotation Diet is going to help her get there!

It worked for Judy...

Here I am with the slacks I used to wear before the Rotation Diet. Now I'm 23 pounds lighter!

And it worked for all these people, too!

Name	Pounds Lost	Name	Pounds Lost
Pat	16	Ann	40
Arlene H.	53	Linda	12
Bill	11 in 30 days	Bill	10
Bob	10 in 1 week	Jean	10 in 2 wks. 24 total
Barry	35 & maintaining	William	10
Ann	60	Judy	25
June	7 in 1 week	Maxine	15 in 2 weeks
Mary	6	Ruth	25 and maintaining
[illegible]	24	Jerry	25
[illegible]	23	Janice	13 in 3 weeks
[illegible]	25	June	35
		Plus tens of thousands more!	

With the Rotation Diet, losers are winners. Wouldn't you like to see your name added to our list of winners? Start the Rotation Diet now and it won't be long before you too are saying, "I'm a losing winner with Rotation, and I feel great!"

In fact, people from all walks of life have become winners with the Rotation Diet.

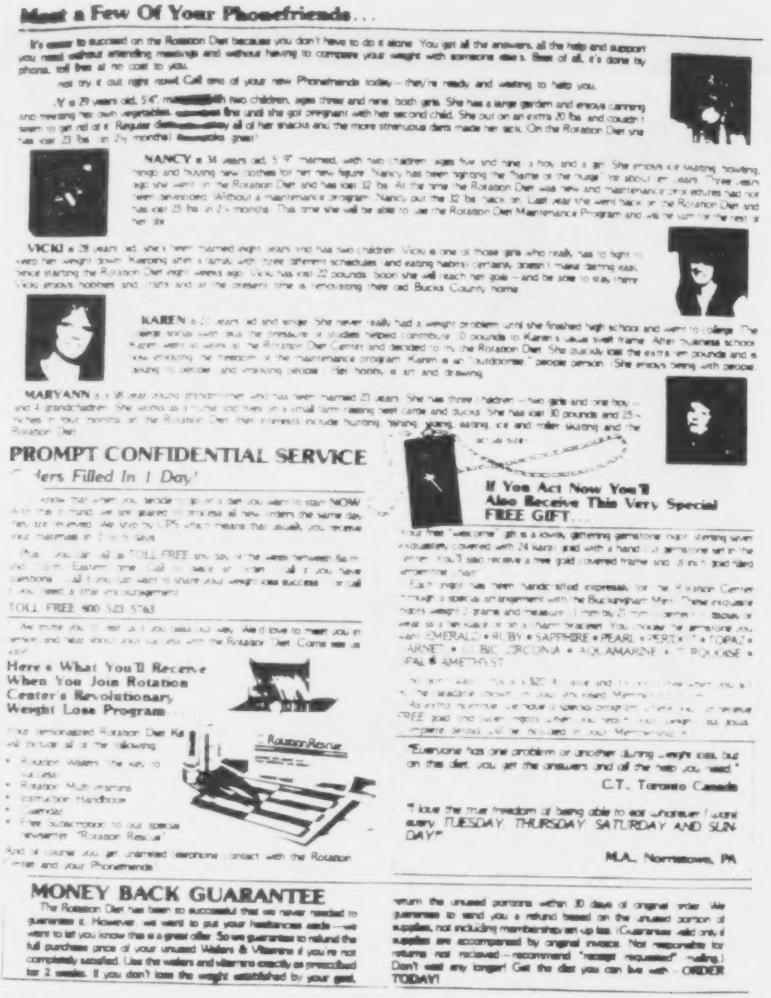
Just look at all the professions represented by Rotation Dieters from all across the country.

housewife
physician
stewardess
dancer
psychologist
real estate agent
school teacher
minister
factory worker
dentist
photographer
eye doctor
baker
nurse
student
manager
beautician
model
food demonstrator
[illegible]

"I feel normal!" J.F., New York, NY

"I've lost over 70 pounds while eating all the ice cream that I want 4 days every week. THIS IS THE MOST SUCCESSFUL DIET EVER!"
P.A., Philadelphia, PA

"I've been on maintenance for 6 months and it's working great! I now have only ONE diet day each week."
S.R., Los Angeles, CA



Meet a Few Of Your Phonefriends...

It's easier to succeed on the Rotation Diet because you don't have to do it alone. You get all the answers, all the help and support you need without attending meetings and without having to compare your weight with someone else's. Best of all, it's done by phone, toll free at no cost to you.

[illegible] try it out right now! Call one of your new Phonefriends today – they're ready and waiting to help you.

[illegible]Y is 29 years old, 5'4", m[illegible] two children, ages three and nine, both girls. She has a large garden and enjoys canning and freezing her own vegetables. [illegible] fine until she got pregnant with her second child. She put on an extra 20 lbs. and couldn't seem to get rid of it. Regular [illegible] all of her snacks and the more strenuous diets made her sick. On the Rotation Diet she has lost 23 lbs. in 2½ months! [illegible] great!

NANCY is 34 years old, 5' 9", married, with two children, ages five and nine, a boy and a girl. She enjoys ice skating, bowling, bingo and buying new clothes for her new figure. Nancy has been fighting the "battle of the bulge" for about ten years. Three years ago she went on the Rotation Diet and has lost 32 lbs. At the time the Rotation Diet was new and maintenance procedures had not been developed. Without a maintenance program, Nancy put the 32 lbs. back on. Last year she went back on the Rotation Diet and has lost 25 lbs. in 2½ months. This time she will be able to use the Rotation Diet Maintenance Program and will be slim for the rest of her life.

VICKI is 28 years old, she's been married eight years and has two children. Vicki is one of those girls who really has to fight to keep her weight down. Keeping after a family with three different schedules (and eating habits) certainly doesn't make dieting easy. Since starting the Rotation Diet eight weeks ago, Vicki has lost 22 pounds. Soon she will reach her goal – and be able to stay there. Vicki enjoys hobbies and crafts and at the present time is renovating their old Bucks County home.

KAREN is 2[illegible] years old and single. She never really had a weight problem until she finished high school and went to college. The [illegible] with [illegible] the pressure of studies helped contribute 10 pounds to Karen's usual svelt frame. After business school Karen went to work at the Rotation Diet Center and decided to try the Rotation Diet. She quickly lost the extra ten pounds and is now enjoying the freedom of the maintenance program. Karen is an "outdoorsy" people person. (She enjoys being with people, talking to people, and enjoying people.) Her hobby is art and drawing.

MARYANN is a 38 year young grandmother who has been married 23 years. She has three children – two girls and one boy – and 4 grandchildren. She works as a nurse and lives on a small farm raising beef cattle and ducks. She has lost 30 pounds and 25½ inches in four months on the Rotation Diet. Her interests include hunting, fishing, [illegible], eating, ice and roller skating and the Rotation Diet.

PROMPT CONFIDENTIAL SERVICE

Orders Filled In 1 Day!

We know that when you decide to go on a diet you want to start NOW. With this in mind, we are geared to process all new orders the same day they are received. We ship by UPS which means that usually you receive your materials in 2 to 5 days.

Plus... you can call us TOLL FREE any day of the week between 8a.m. and 10p.m. Eastern time. Call to place an order... call if you have questions... call if you just want to share your weight loss success... or call if you need a little encouragement.

TOLL FREE 800 523 5763

We invite you to visit us if you pass our way. We'd love to meet you in person and hear about your success with the Rotation Diet. Come see us soon.

Here's What You'll Receive When You Join Rotation Center's Revolutionary Weight Loss Program...

Your personalized Rotation Diet Kit will include all of the following:

- Rotation Wafers (the key to success)
- Rotation Multi-vitamins
- Instruction Handbook
- Calendar
- Free Subscription to our special newsletter "Rotation Rescue"

And of course you get unlimited telephone contact with the Rotation Center and your Phonefriends!

If You Act Now You'll Also Receive This Very Special FREE GIFT...

Your free "welcome" gift is a lovely glittering gemstone ingot, sterling silver exquisitely covered with 24 karat gold with a hand cut gemstone set in the center. You'll also receive a free gold covered frame and 18 inch gold filled serpentine chain.

Each ingot has been handcrafted expressly for the Rotation Center through a special arrangement with the Buckingham Mint. These exquisite ingots weigh 2 grams and measure 11 mm by 21 mm. (perfect to display or wear as a necklace or on a charm bracelet. You choose the gemstone you want: EMERALD • RUBY • SAPPHIRE • PEARL • PERIDOT • TOPAZ • GARNET • CUBIC ZIRCONIA • AQUAMARINE • TURQUOISE • OPAL • AMETHYST

[illegible] This is a $20 value and it's yours free when you [illegible] the [illegible] in your enclosed Membership [illegible]

As extra incentive we have a special program where you can receive FREE gold and silver ingots when you reach your weight loss goals. Complete details will be included in your Membership Kit.

"Everyone has one problem or another during weight loss, but on this diet, you get the answers and all the help you need."

C.T., Toronto Canada

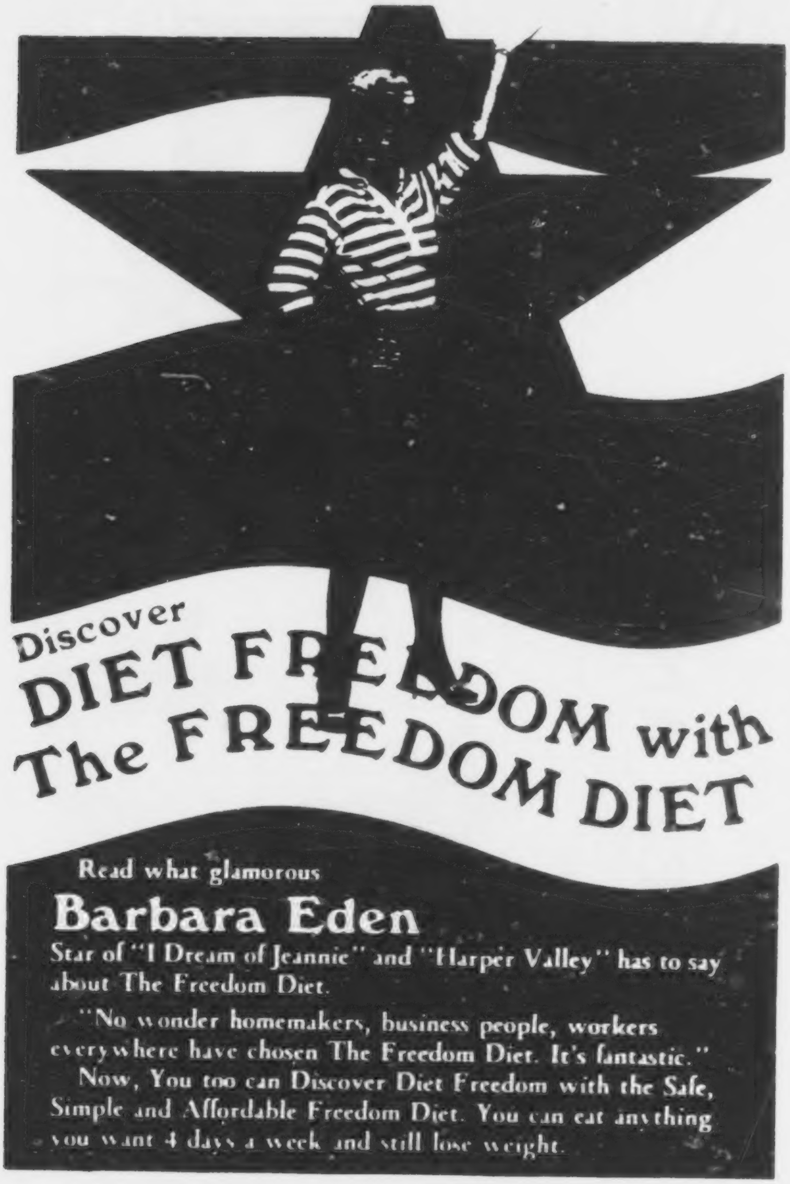
"I love the true freedom of being able to eat whatever I want every TUESDAY, THURSDAY, SATURDAY AND SUNDAY!"

M.A., Norristown, PA

MONEY BACK GUARANTEE

The Rotation Diet has been so successful that we never needed to guarantee it. However, we want to put your hesitancies aside—we want to let you know this is a great offer. So we guarantee to refund the full purchase price of your unused Wafers & Vitamins if you're not completely satisfied. Use the wafers and vitamins exactly as prescribed for 2 weeks. If you don't lose the weight established by your goal, return the unused portions within 30 days of original order. We guarantee to send you a refund based on the unused portion of supplies, not including membership set-up fee. (Guarantee valid only if supplies are accompanied by original invoice. Not responsible for returns not recieved – recommend "receipt requested" mailing.) Don't wait any longer! Get the diet you can live with - ORDER TODAY!

EXHIBIT B



Discover
DIET FREEDOM with
The FREEDOM DIET

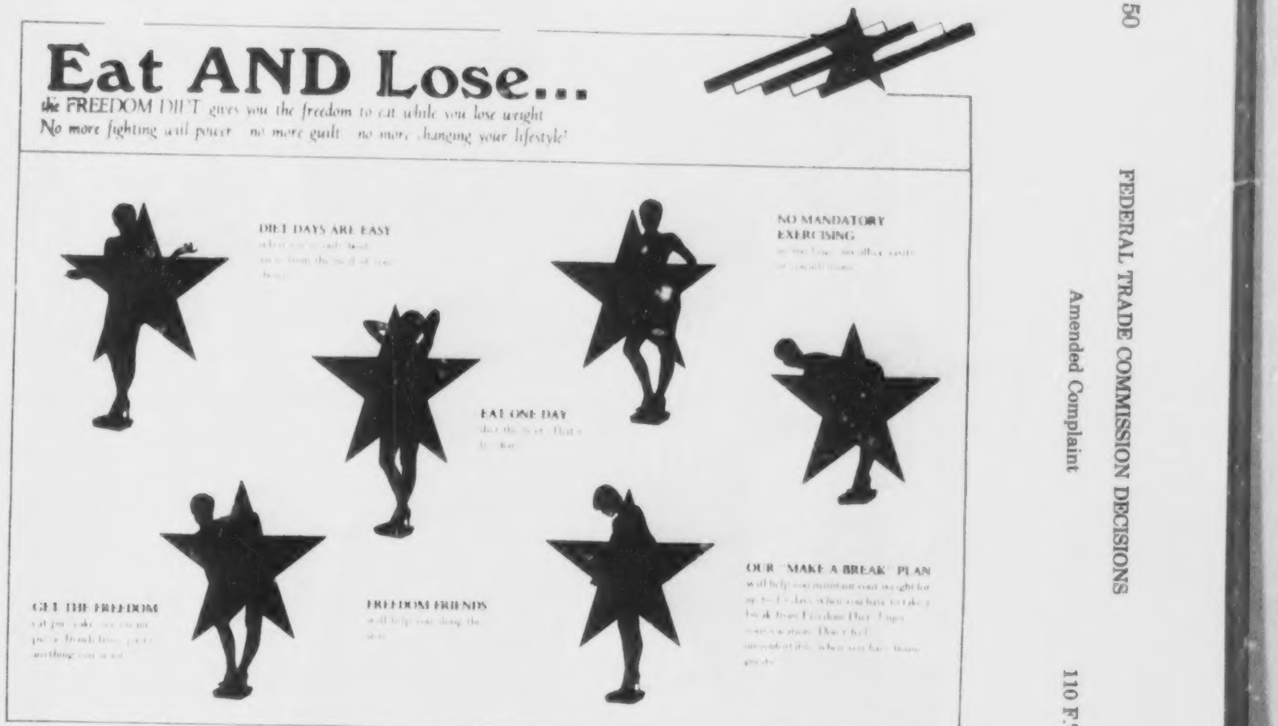
Read what glamorous

Barbara Eden

Star of "I Dream of Jeannie" and "Harper Valley" has to say about The Freedom Diet.

"No wonder homemakers, business people, workers everywhere have chosen The Freedom Diet. It's fantastic."

Now, You too can Discover Diet Freedom with the Safe, Simple and Affordable Freedom Diet. You can eat anything you want 4 days a week and still lose weight.



Eat AND Lose...

the FREEDOM DIET *gives you the freedom to eat while you lose weight*
No more fighting will power no more guilt no more changing your lifestyle!

DIET DAYS ARE EASY

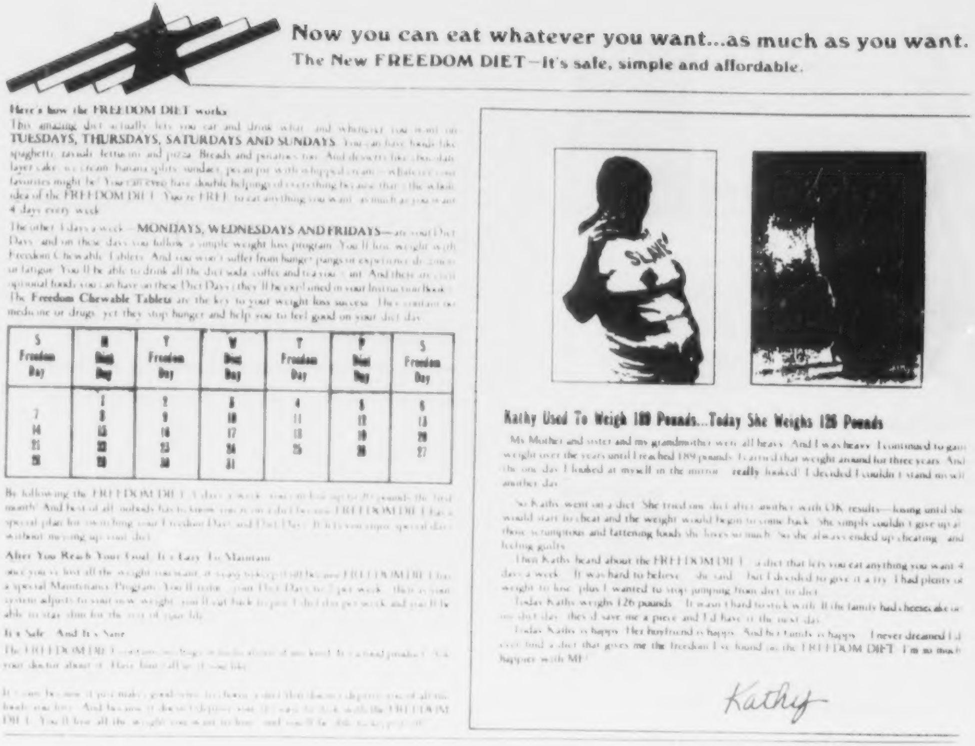
NO MANDATORY EXERCISING

EAT ONE DAY

GET THE FREEDOM

FREEDOM FRIENDS

OUR "MAKE A BREAK" PLAN



Now you can eat whatever you want...as much as you want.

The New FREEDOM DIET—It's safe, simple and affordable.

Here's how the FREEDOM DIET works

This amazing diet actually lets you eat and drink what and whenever you want on **TUESDAYS, THURSDAYS, SATURDAYS AND SUNDAYS**. You can have foods like spaghetti, ravioli, fettucini and pizza. Breads and potatoes too. And desserts like chocolate layer cake, ice cream, banana splits, sundaes, pecan pie with whipped cream—whatever your favorites might be! You can even have double helpings of everything because that's the whole idea of the FREEDOM DIET. You're FREE to eat anything you want, as much as you want 4 days every week.

The other 3 days a week—**MONDAYS, WEDNESDAYS AND FRIDAYS**—are your Diet Days, and on these days you follow a simple weight loss program. You'll lose weight with Freedom Chewable Tablets. And you won't suffer from hunger pangs or experience dizziness or fatigue. You'll be able to drink all the diet soda, coffee and tea you want. And there are even optional foods you can have on these Diet Days (they'll be explained in your Instruction Book). The **Freedom Chewable Tablets** are the key to your weight loss success. They contain no medicine or drugs, yet they stop hunger and help you to feel good on your diet day.

S Freedom Day	M Diet Day	T Freedom Day	W Diet Day	T Freedom Day	F Diet Day	S Freedom Day
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

By following the FREEDOM DIET 3 days a week, you can lose up to 20 pounds the first month! And best of all, nobody has to know you're on a diet because FREEDOM DIET has a special plan for switching your Freedom Days and Diet Days. It lets you enjoy special days without messing up your diet.

After You Reach Your Goal, It's Easy To Maintain

Once you've lost all the weight you want, it's easy to keep it off because FREEDOM DIET has a special Maintenance Program. You'll reduce your Diet Days to 2 per week... then as your system adjusts to your new weight, you'll cut back to just 1 diet day per week and you'll be able to stay slim for the rest of your life.

It's Safe... And It's Sane

The FREEDOM DIET contains no drugs or medications of any kind. It's a food product. Ask your doctor about it. Have him call us if you like.

It's sane because it just makes good sense to choose a diet that doesn't deprive you of all the foods you love. And because it doesn't deprive you, it's easy to stick with the FREEDOM DIET. You'll lose all the weight you want to lose... and you'll be able to keep it off.

Kathy Used To Weigh 189 Pounds...Today She Weighs 126 Pounds

"My Mother and sister and my grandmother were all heavy. And I was heavy. I continued to gain weight over the years until I reached 189 pounds. I carried that weight around for three years. And then one day I looked at myself in the mirror... really looked! I decided I couldn't stand myself another day."

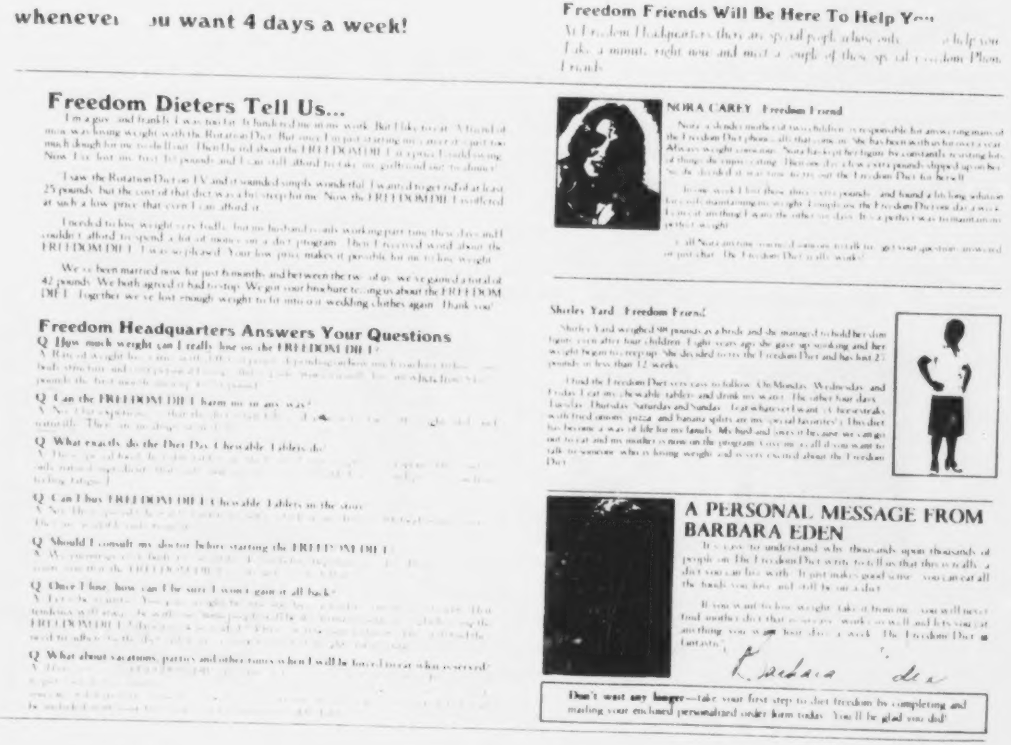
So Kathy went on a diet. She tried one diet after another with OK results—losing until she would start to cheat and the weight would begin to come back. She simply couldn't give up all those scrumptious and fattening foods she loves so much. So she always ended up cheating... and feeling guilty.

Then Kathy heard about the FREEDOM DIET... a diet that lets you eat anything you want 4 days a week. "It was hard to believe," she said, "but I decided to give it a try. I had plenty of weight to lose, plus I wanted to stop jumping from diet to diet."

Today Kathy weighs 126 pounds. "It wasn't hard to stick with. If the family had cheesecake on my diet day, they'd save me a piece and I'd have it the next day."

Today Kathy is happy. Her boyfriend is happy. And her family is happy. "I never dreamed I'd ever find a diet that gives me the freedom I've found in the FREEDOM DIET. I'm so much happier with ME!"

Kathy



whenever ou want 4 days a week!

Freedom Dieters Tell Us...

Freedom Headquarters Answers Your Questions

Q How much weight can I really lose on the FREEDOM DIET?

Q Can the FREEDOM DIET harm me in any way?

Q What exactly do the Diet Day Chewable Tablets do?

Q Can I buy FREEDOM DIET Chewable Tablets in the store?

Q Should I consult my doctor before starting the FREEDOM DIET?

Q Once I lose, how can I be sure I won't gain it all back?

Q What about vacations, parties and other times when I will be forced to eat what is served?

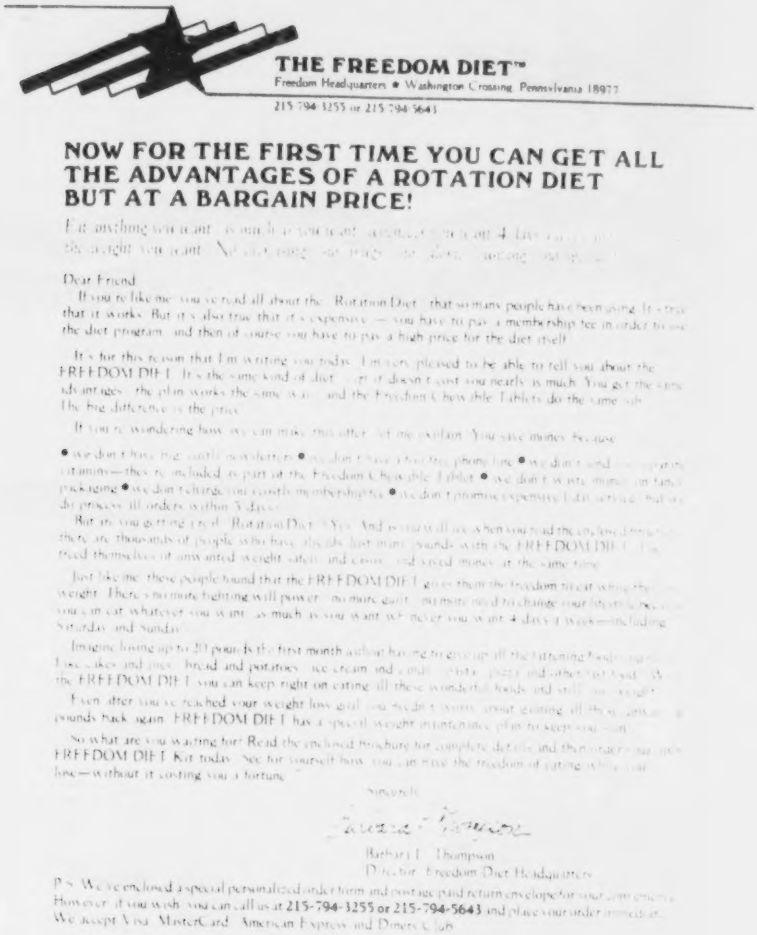
Freedom Friends Will Be Here To Help You

NORA CAREY Freedom Friend

Shirley Yard Freedom Friend

A PERSONAL MESSAGE FROM BARBARA EDEN

Don't wait any longer—take your first step to diet freedom by completing and mailing your enclosed personalized order form today. You'll be glad you did!



THE FREEDOM DIET™
Freedom Headquarters • Washington Crossing, Pennsylvania 18977
215-794-3255 or 215-794-5643

NOW FOR THE FIRST TIME YOU CAN GET ALL THE ADVANTAGES OF A ROTATION DIET BUT AT A BARGAIN PRICE!

Eat anything you want, as much as you want, [illegible] 4 days [illegible] the weight you want. No [illegible]

Dear Friend,

If you're like me, you've read all about the "Rotation Diet" that so many people have been using. It's true that it works. But it's also true that it's expensive — you have to pay a membership fee in order to use the diet program, and then of course you have to pay a high price for the diet itself.

It's for this reason that I'm writing you today. I'm very pleased to be able to tell you about the FREEDOM DIET. It's the same kind of diet, yet it doesn't cost you nearly as much. You get the same advantages, the plan works the same way, and the Freedom Chewable Tablets do the same job. The big difference is the price.

If you're wondering how we can make this offer, let me explain. You save money because:

● we don't have [illegible] costly newsletters ● we don't have a toll-free phone line ● we don't send [illegible] vitamins—they're included as part of the Freedom Chewable Tablet ● we don't waste money on fancy packaging ● we don't charge you costly membership fee ● we don't promise expensive [illegible] service, but we do process all orders within 5 days.

But are you getting a real "Rotation Diet"? Yes! And as you will see when you read the enclosed [illegible], there are thousands of people who have already lost many pounds with the FREEDOM DIET. They freed themselves of unwanted weight safely and easily, and saved money at the same time.

Just like me, these people found that the FREEDOM DIET gives them the freedom to eat while they lose weight. There's no more fighting will power, no more guilt, no more need to change your lifestyle because you can eat whatever you want, as much as you want, whenever you want 4 days a week—including Saturday and Sunday.

Imagine losing up to 20 pounds the first month without having to give up all the fattening foods you love, like cakes and pies, bread and potatoes, ice cream and candy, pasta, pizza and other fast foods. With the FREEDOM DIET you can keep right on eating all these wonderful foods and still lose weight.

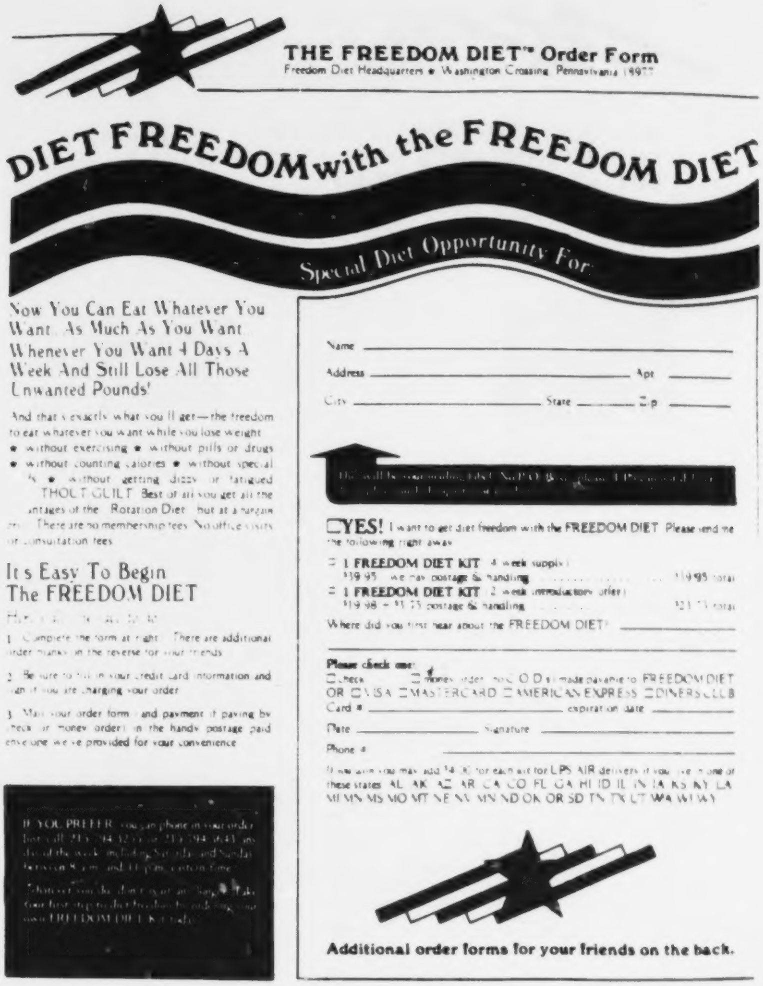
Even after you've reached your weight loss goal, you needn't worry about gaining all those unwanted pounds back again. FREEDOM DIET has a special weight maintenance plan to keep you slim.

So what are you waiting for? Read the enclosed brochure for complete details and then order your own FREEDOM DIET Kit today. See for yourself how you can have the freedom of eating while you lose—without it costing you a fortune.

Sincerely,

Barbara L. Thompson
Director, Freedom Diet Headquarters

P.S. We've enclosed a special personalized order form and postage-paid return envelope for your convenience. However, if you wish, you can call us at **215-794-3255 or 215-794-5643** and place your order immediately. We accept Visa, MasterCard, American Express and Diners Club.



THE FREEDOM DIET™ Order Form

Freedom Diet Headquarters ● Washington Crossing, Pennsylvania 18977

DIET FREEDOM with the FREEDOM DIET

Special Diet Opportunity For:

Now You Can Eat Whatever You Want, As Much As You Want, Whenever You Want 4 Days A Week And Still Lose All Those Unwanted Pounds!

And that's exactly what you'll get—the freedom to eat whatever you want while you lose weight ● without exercising ● without pills or drugs ● without counting calories ● without special foods ● without getting dizzy or fatigued ● WITHOUT GUILT. Best of all you get all the advantages of the "Rotation Diet" but at a bargain price. There are no membership fees. No office visits or consultation fees.

It's Easy To Begin The FREEDOM DIET

Here's all you have to do:

1. Complete the form at right. (There are additional order blanks on the reverse for your friends.)

2. Be sure to fill in your credit card information and sign if you are charging your order.

3. Mail your order form (and payment if paying by check or money order) in the handy postage paid envelope we've provided for your convenience.

IF YOU PREFER, you can phone in your order. Just call 215-794-32[illegible] or 215-794-3643 any day of the week including Saturday and Sunday between 8 a.m. and 11 p.m. eastern time.

Whatever you do, don't wait any longer. Take your first step to diet freedom by ordering your own FREEDOM DIET Kit today.

Name ______

Address ______ Apt ______

City ______ State ______ Zip ______

This will be your mailing label. [illegible]

☐YES! I want to get diet freedom with the FREEDOM DIET. Please send me the following right away:

☐ 1 FREEDOM DIET KIT (4 week supply) $39.95 (we pay postage & handling) .... $39.95 total

☐ 1 FREEDOM DIET KIT (2 week introductory offer) $19.98 + $1.75 postage & handling .... $21.73 total

Where did you first hear about the FREEDOM DIET? ______

Please check one:

☐ check ☐ money order (no C.O.D.s) made payable to FREEDOM DIET

OR ☐ VISA ☐ MASTERCARD ☐ AMERICAN EXPRESS ☐ DINERS CLUB

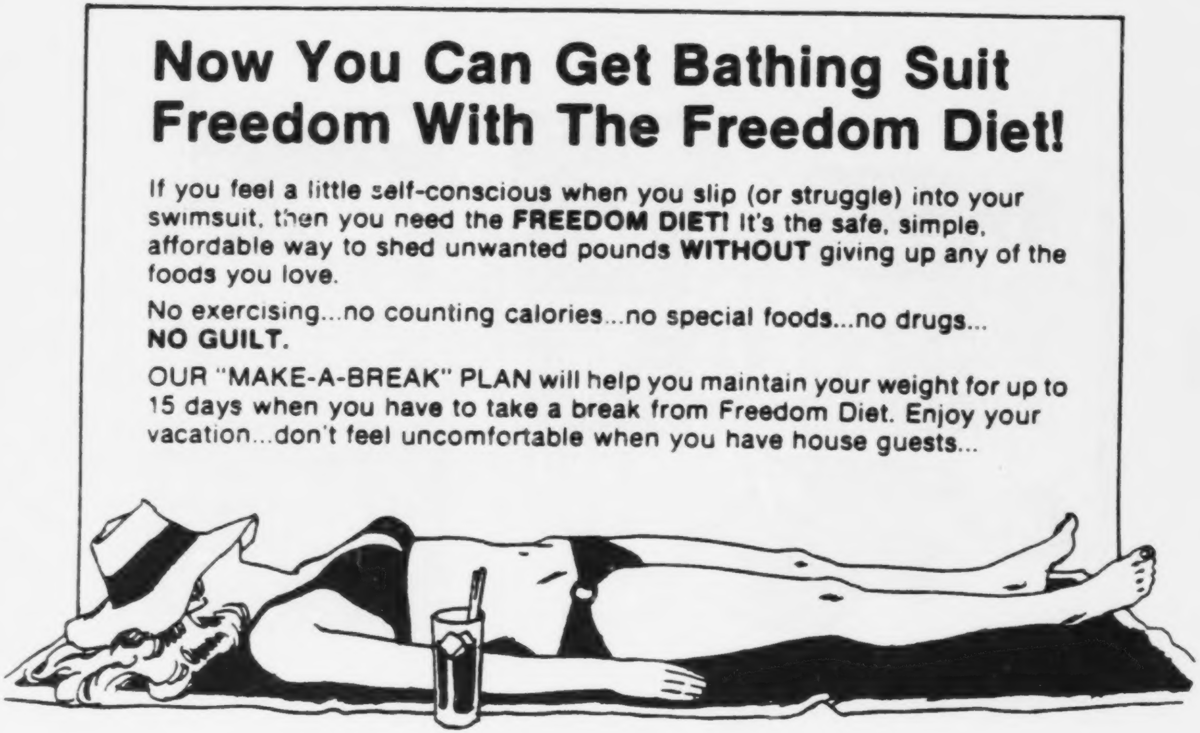
Card # ______ expiration date ______

Date ______ Signature ______

Phone # ______

If you wish you may add $4.00 for each kit for UPS AIR delivery if you live in one of these states: AL AK AZ AR CA CO FL GA HI ID IL IN IA KS KY LA MI MN MS MO MT NE NV MN ND OK OR SD TN TX UT WA WI WY

Additional order forms for your friends on the back.



Now You Can Get Bathing Suit Freedom With The Freedom Diet!

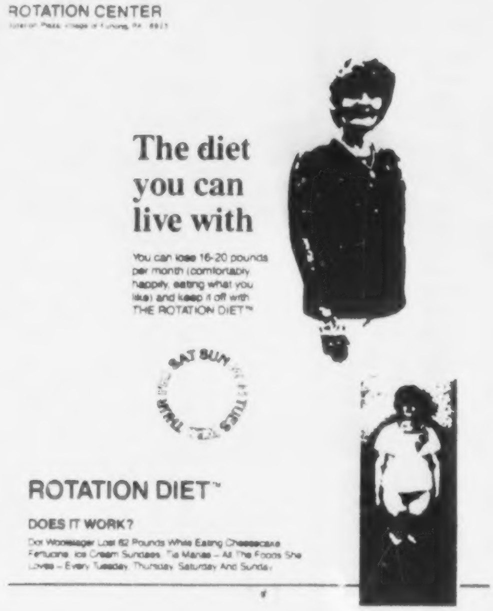
If you feel a little self-conscious when you slip (or struggle) into your swimsuit, then you need the **FREEDOM DIET!** It's the safe, simple, affordable way to shed unwanted pounds **WITHOUT** giving up any of the foods you love.

No exercising...no counting calories...no special foods...no drugs...
NO GUILT.

OUR "MAKE-A-BREAK" PLAN will help you maintain your weight for up to 15 days when you have to take a break from Freedom Diet. Enjoy your vacation...don't feel uncomfortable when you have house guests...

Reproduced from poor document.

EXHIBIT C



ROTATION CENTER

The diet you can live with

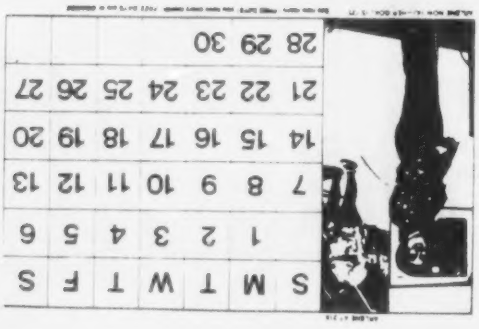
You can lose 16-20 pounds per month (comfortably, happily, eating what you like) and keep it off with THE ROTATION DIET™

SAT SUN
TUES
THUR

ROTATION DIET™

DOES IT WORK?

Dot Woolslager Lost 62 Pounds While Eating Cheesecake, Fettucine, Ice Cream Sundaes, Tia Marias – All The Foods She Loves – Every Tuesday, Thursday, Saturday And Sunday.



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	1	2	3	4	5	6
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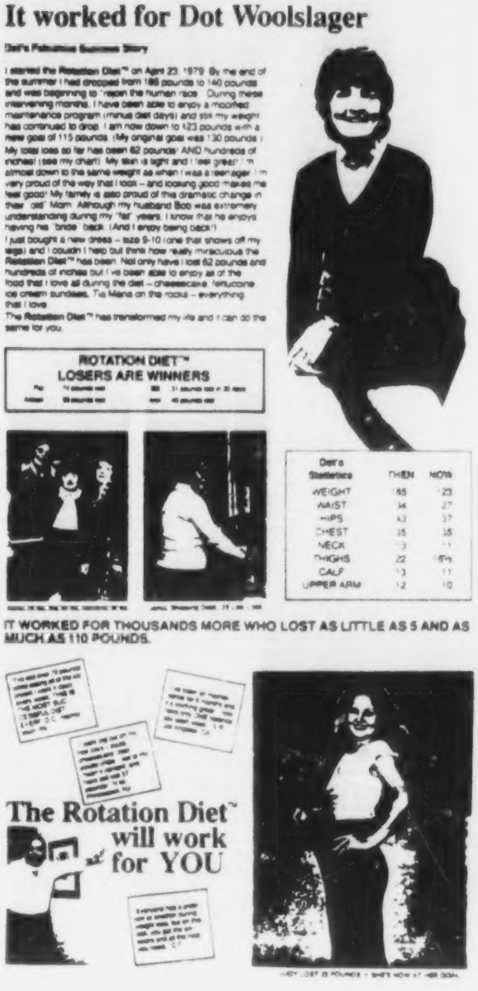


It worked for Dot Woolslager

Dot's Fabulous Success Story

I started the **Rotation Diet™** on April 23, 1979. By the end of the summer I had dropped from 185 pounds to 140 pounds and was beginning to "rejoin the human race." During these intervening months, I have been able to enjoy a modified maintenance program (minus diet days) and still my weight has continued to drop. I am now down to 123 pounds with a new goal of 115 pounds. (My original goal was 130 pounds.) My total loss so far has been 62 pounds! AND hundreds of inches! (see my chart) My skin is tight and I feel great! I'm almost down to the same weight as when I was a teenager. I'm very proud of the way that I look – and looking good makes me feel good! My family is also proud of the dramatic change in their "old" Mom. Although my husband Bob was extremely understanding during my "fat" years, I know that he enjoys having his "bride" back. (And I enjoy being back!)

I just bought a new dress – size 9-10 (one that shows off my legs) and I couldn't help but think how really miraculous the **Rotation Diet™** has been. Not only have I lost 62 pounds and hundreds of inches but I've been able to enjoy all of the food that I love all during the diet – cheesecake, fettuccine, ice cream sundaes, Tia Maria on the rocks – everything that I love.

The **Rotation Diet™** has transformed my life and it can do the same for you.

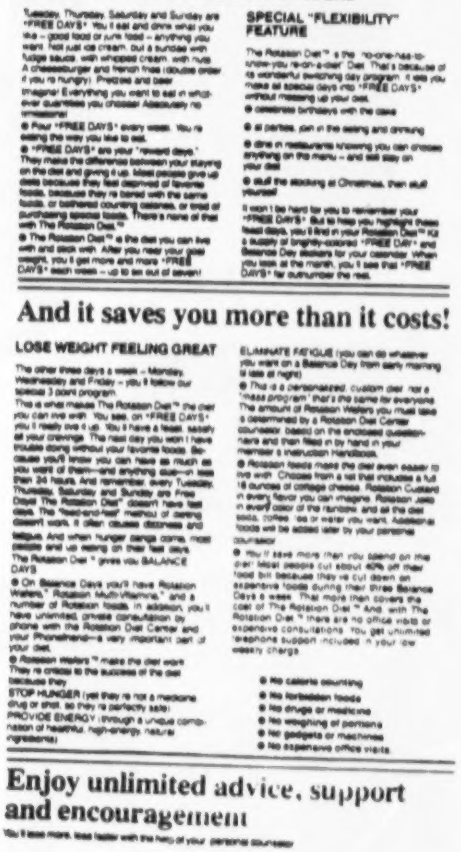
ROTATION DIET™
LOSERS ARE WINNERS

Dot's Statistics	THEN	NOW
WEIGHT	185	123
WAIST	34	27
HIPS	43	37
CHEST	35	35
NECK	13	11
THIGHS	22	18½
CALF	13	11
UPPER ARM	12	10

IT WORKED FOR THOUSANDS MORE WHO LOST AS LITTLE AS 5 AND AS MUCH AS 110 POUNDS.

The Rotation Diet™ will work for YOU

JUDY LOST 23 POUNDS – SHE'S NOW AT HER GOAL



Here's how...

It's easy! It's successful! And it *saves* you more than it costs!

EAT WHATEVER YOU WANT, AS MUCH AS YOU LIKE

Tuesday, Thursday, Saturday and Sunday are *FREE DAYS*. You'll eat and drink what you like – good food or junk food – anything you want. Not just ice cream, but a sundae with fudge sauce, with whipped cream, with nuts. A cheeseburger and french fries (double order if you're hungry). Pretzels and beer. Imagine! Everything you want to eat in whatever quantities you choose! Absolutely no limitations!

● Four *FREE DAYS* every week. You're eating the way you like to eat.

● *FREE DAYS* are your "reward days." They make the difference between your staying on the diet and giving it up. Most people give up diets because they feel deprived of favorite foods, because they're bored with the same foods, or bothered counting calories, or tired of purchasing special foods. There's none of that with The Rotation Diet.™

● The Rotation Diet™ is the diet you can live with and stick with. After you reach your goal weight, you'll get more and more *FREE DAYS* each week – up to six out of seven!

SPECIAL "FLEXIBILITY" FEATURE

The Rotation Diet™ is the "no-one-has-to-know-you're-on-a-diet" Diet. That's because of its wonderful switching day program. It lets you make all special days into *FREE DAYS* without messing up your diet.

● celebrate birthdays with the cake

● at parties, join in the eating and drinking

● dine in restaurants knowing you can choose anything on the menu – and still stay on your diet

● stuff the stocking at Christmas, then stuff yourself

It won't be hard for you to remember your *FREE DAYS*. But to help you highlight these feast days, you'll find in your Rotation Diet™ Kit a supply of brightly-colored *FREE DAY* and Balance Day stickers for your calendar. When you look at the month, you'll see that *FREE DAYS* far outnumber the rest.

And it saves you more than it costs!

LOSE WEIGHT FEELING GREAT

The other three days a week – Monday, Wednesday and Friday – you'll follow our special 3 point program.

This is what makes The Rotation Diet™ the diet you can live with. You see, on *FREE DAYS* you'll really live it up. You'll have a feast, satisfy all your cravings. The next day you won't have trouble doing without your favorite foods. Because you'll know you can have as much as you want of them—and anything else—in less than 24 hours. And remember, every Tuesday, Thursday, Saturday and Sunday are Free Days! The Rotation Diet™ doesn't have fast days. The "feast-and-fast" method of dieting doesn't work. It often causes dizziness and fatigue. And when hunger pangs come, most people end up eating on their fast days. The Rotation Diet™ gives you BALANCE DAYS.

● On Balance Days you'll have Rotation Wafers,™ Rotation Multi-Vitamins,™ and a number of Rotation foods. In addition, you'll have unlimited, private consultation by phone with the Rotation Diet Center and your Phonefriend—a very important part of your diet.

● *Rotation Wafers™ make the diet work.* They're critical to the success of the diet because they

STOP HUNGER (yet they're not a medicine, drug or shot, so they're perfectly safe)

PROVIDE ENERGY (through a unique combination of healthful, high-energy, natural ingredients)

ELIMINATE FATIGUE (you can do whatever you want on a Balance Day from early morning to late at night)

● *This is a personalized, custom diet, not a "mass program" that's the same for everyone.* The amount of Rotation Wafers you must take is determined by a Rotation Diet Center counselor based on the enclosed questionnaire and then filled in by hand in your member's Instruction Handbook.

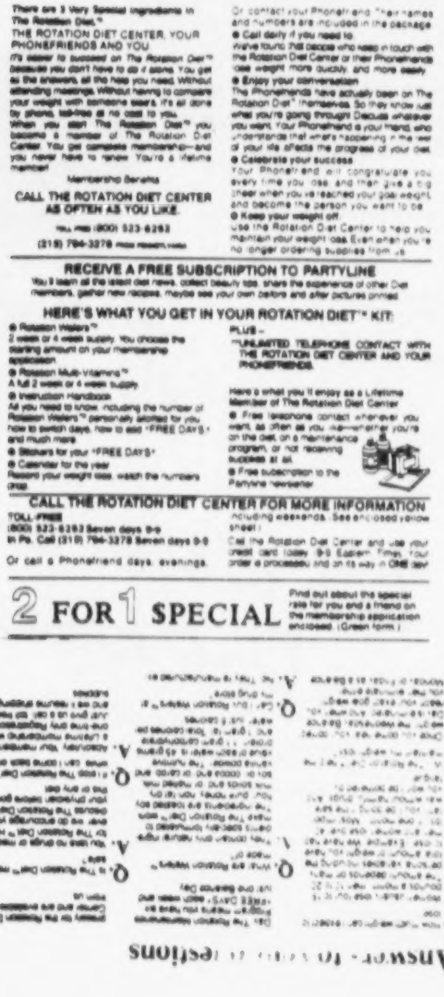
● *Rotation foods make the diet even easier to live with.* Choose from a list that includes a full 16 ounces of cottage cheese, Rotation Custard in every flavor you can imagine, Rotation Jello in every color of the rainbow, and all the diet soda, coffee, tea or water you want. Additional foods will be added later by your personal counselor.

● *You'll save more than you spend on the diet!* Most people cut about 40% off their food bill because they've cut down on expensive foods during their three Balance Days a week. That more than covers the cost of The Rotation Diet.™ And, with The Rotation Diet™ there are no office visits or expensive consultations. You get unlimited telephone support included in your low weekly charge.

- ● No calorie counting
- ● No forbidden foods
- ● No drugs or medicine
- ● No weighing of portions
- ● No gadgets or machines
- ● No expensive office visits

Enjoy unlimited advice, support and encouragement

You'll lose more, lose faster with the help of your personal counselor



There are 3 Very Special Ingredients in The Rotation Diet.™

THE ROTATION DIET CENTER, YOUR PHONEFRIENDS AND YOU

It's easier to succeed on The Rotation Diet™ because you don't have to do it alone. You get all the answers, all the help you need. Without attending meetings. Without having to compare your weight with someone else's. It's all done by phone, toll-free at no cost to you.

When you start The Rotation Diet™ you become a member of The Rotation Diet Center. You get complete membership—and you never have to renew. You're a lifetime member!

Membership Benefits

CALL THE ROTATION DIET CENTER AS OFTEN AS YOU LIKE.

Toll free (800) 523-6262

(215) 794-3278 in Pennsylvania

Or contact your Phonefriend. Their names and numbers are included in the package.

- **Call daily if you need to**

We've found that people who keep in touch with the Rotation Diet Center or their Phonefriends lose weight more quickly, and more easily.

- **Enjoy your conversation**

The Phonefriends have actually been on The Rotation Diet™ themselves. So they know just what you're going through. Discuss whatever you want. Your Phonefriend is your friend, who understands that what's happening in the rest of your life affects the progress of your diet.

- **Celebrate your success**

Your Phonefriend will congratulate you every time you lose, and then give a big cheer when you've reached your goal weight, and become the person you want to be.

- **Keep your weight off**

Use the Rotation Diet Center to help you maintain your weight loss. Even when you're no longer ordering supplies from us.

RECEIVE A FREE SUBSCRIPTION TO PARTYLINE

You'll learn all the latest diet news, collect beauty tips, share the experience of other Diet members, gather new recipes, maybe see your own before and after pictures printed.

HERE'S WHAT YOU GET IN YOUR ROTATION DIET™ KIT:

- Rotation Wafers™

2 week or 4 week supply. You choose the starting amount on your membership application.

- Rotation Multi-Vitamins™

A full 2 week or 4 week supply.

- Instruction Handbook

All you need to know, including the number of Rotation Wafers™ personally allotted for you, how to switch days, how to add "FREE DAYS" and much more.

- Stickers for your "FREE DAYS"
- Calendar for the year

Record your weight loss, watch the numbers drop.

PLUS –

UNLIMITED TELEPHONE CONTACT WITH THE ROTATION DIET CENTER AND YOUR PHONEFRIENDS.

Here's what you'll enjoy as a Lifetime Member of The Rotation Diet Center:

- Free telephone contact whenever you want, as often as you like—whether you're on the diet, on a maintenance program, or not receiving supplies at all.
- Free subscription to the Partyline newsletter.

CALL THE ROTATION DIET CENTER FOR MORE INFORMATION

TOLL-FREE

(800) 523-6262 Seven days 9-9

In Pa. Call (215) 794-3278 Seven days 9-9

Or call a Phonefriend days, evenings, including weekends. (See enclosed yellow sheet.)

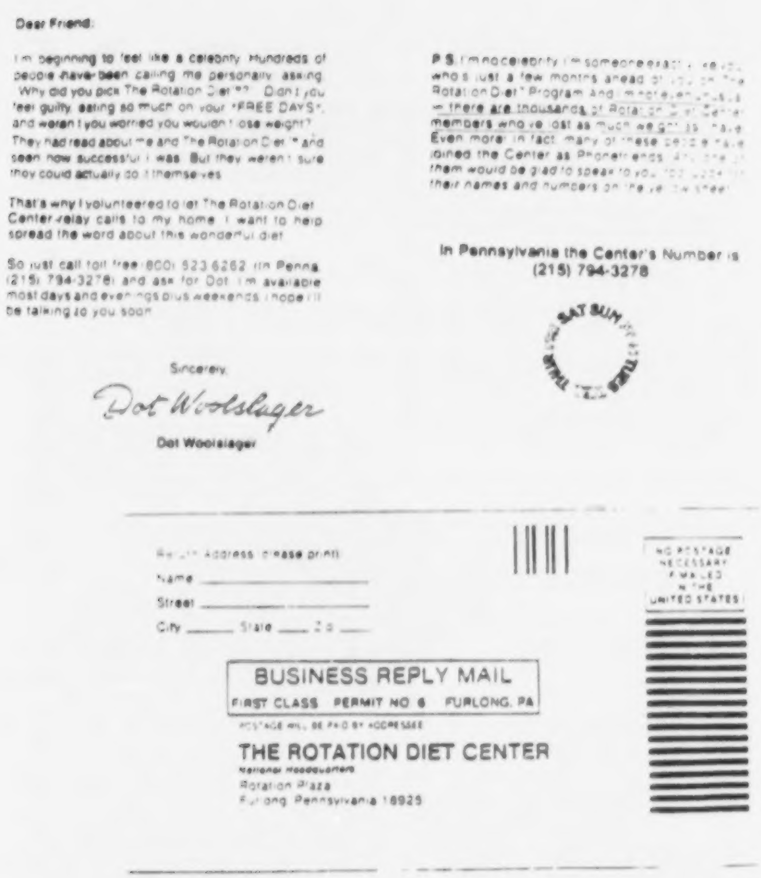
Call the Rotation Diet Center and use your credit card today (9-9 Eastern Time). Your order is processed and on its way in ONE day.

2 FOR 1 SPECIAL

Find out about the special rate for you and a friend on the membership application enclosed. (Green form.)

"I'm so pleased about what happened to me, I'd love to help it happen to you."

Talk it over with Dot herself....



Dear Friend:

I'm beginning to feel like a celebrity. Hundreds of people have been calling me personally asking, "Why did you pick The Rotation Diet™?" "Didn't you feel guilty eating so much on your "FREE DAYS", and weren't you worried you wouldn't lose weight?" They had read about me and The Rotation Diet™ and seen how successful I was. But they weren't sure they could actually do it themselves.

That's why I volunteered to let The Rotation Diet Center relay calls to my home. I want to help spread the word about this wonderful diet.

So just call toll free (800) 523-6262 (in Penna. (215) 794-3278) and ask for Dot. I'm available most days and evenings plus weekends. I hope I'll be talking to you soon.

Sincerely,

Dot Woolslager

Dot Woolslager

P.S. I'm no celebrity. I'm someone exactly like you who's just a few months ahead of you on The Rotation Diet™ Program. And I'm not even unusual — there are thousands of Rotation Diet Center members who've lost as much weight as I have. Even more! In fact, many of these people have joined the Center as PhoneFriends. Any one of them would be glad to speak to you. [illegible] their names and numbers on the yellow sheet.

In Pennsylvania the Center's Number is (215) 794-3278

SAT SUN

Return Address (please print)
Name __________
Street __________
City _____ State ____ Zip ____

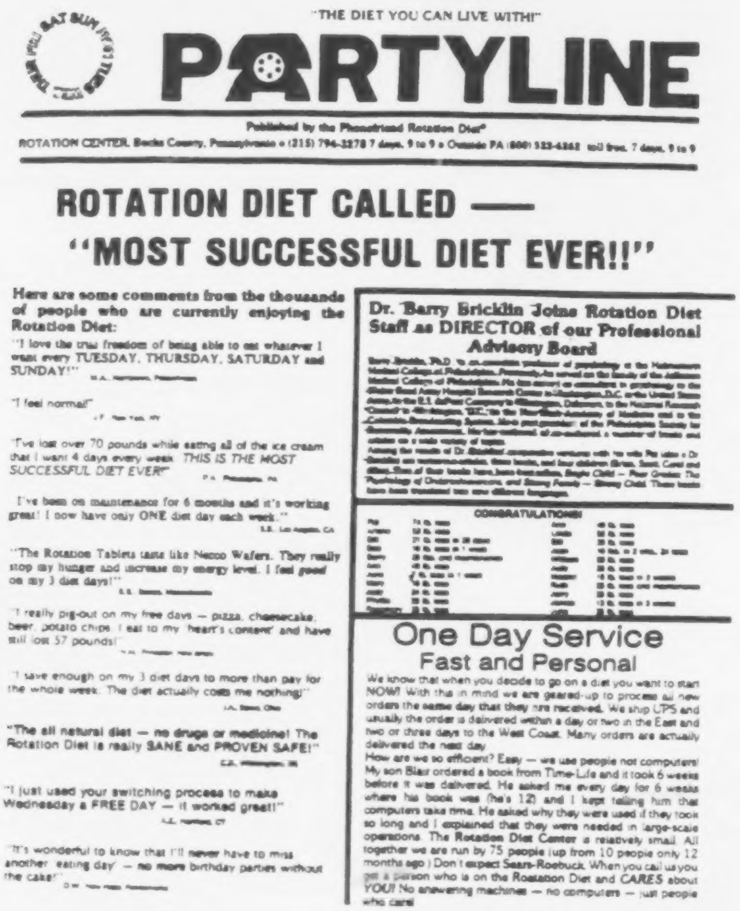
NO POSTAGE
NECESSARY
IF MAILED
IN THE
UNITED STATES

BUSINESS REPLY MAIL
FIRST CLASS PERMIT NO 6 FURLONG, PA

POSTAGE WILL BE PAID BY ADDRESSEE

THE ROTATION DIET CENTER
National Headquarters
Rotation Plaza
Furlong, Pennsylvania 18925

EXHIBIT D



"THE DIET YOU CAN LIVE WITH!"

PARTYLINE

Published by the Phonefriend Rotation Diet®

ROTATION CENTER, Bucks County, Pennsylvania • (215) 794-2278 7 days, 9 to 9 • Outside PA (800) 523-6262 toll free, 7 days, 9 to 9

ROTATION DIET CALLED — "MOST SUCCESSFUL DIET EVER!!"

Here are some comments from the thousands of people who are currently enjoying the Rotation Diet:

"I love the true freedom of being able to eat whatever I want every TUESDAY, THURSDAY, SATURDAY and SUNDAY!"
[illegible]

"I feel normal!"
J.F., New York, NY

"I've lost over 70 pounds while eating all of the ice cream that I want 4 days every week. *THIS IS THE MOST SUCCESSFUL DIET EVER!*"
P.A., Philadelphia, PA

"I've been on maintenance for 6 months and it's working great! I now have only ONE diet day each week."
S.B., Los Angeles, CA

"The Rotation Tablets taste like Necco Wafers. They really stop my hunger and increase my energy level. I feel *good* on my 3 diet days!"
[illegible]

"I really pig-out on my free days — pizza, cheesecake, beer, potato chips. I eat to my 'heart's content' and have still lost 57 pounds!"
[illegible]

"I save enough on my 3 diet days to more than pay for the whole week. The diet actually costs me nothing!"
[illegible]

"The all natural diet — no drugs or medicine! The Rotation Diet is really SANE and PROVEN SAFE!"
C.R., Wilmington, DE

"I just used your switching process to make Wednesday a FREE DAY — it worked great!"
A.L., Hartford, CT

"It's wonderful to know that I'll never have to miss another 'eating day' — no more birthday parties without the cake!"
[illegible]

Dr. Barry Bricklin Joins Rotation Diet Staff as DIRECTOR of our Professional Advisory Board

[illegible]

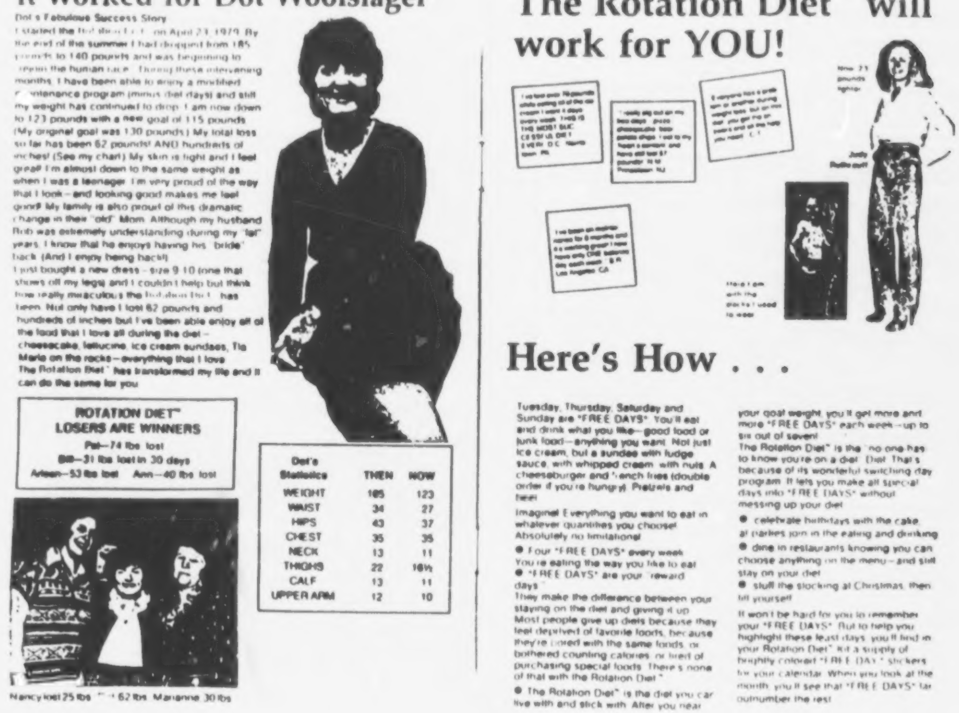
CONGRATULATIONS!

[illegible]

One Day Service
Fast and Personal

We know that when you decide to go on a diet you want to start NOW! With this in mind we are geared-up to process all new orders the same day that they are received. We ship UPS and usually the order is delivered within a day or two in the East and two or three days to the West Coast. Many orders are actually delivered the next day.

How are we so efficient? Easy — we use people not computers! My son Blair ordered a book from Time-Life and it took 6 weeks before it was delivered. He asked me every day for 6 weeks where his book was (he's 12) and I kept telling him that computers take time. He asked why they were used if they took so long and I explained that they were needed in large-scale operations. The Rotation Diet Center is relatively small. All together we are run by 75 people (up from 10 people only 12 months ago.) Don't expect Sears-Roebuck. When you call us you get a person who is on the Rotation Diet and *CARES* about *YOU!* No answering machines — no computers — just people who care!



It worked for Dot Woolslager

Dot's Fabulous Success Story

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I just bought a new dress—size 9-10 (one that shows off my legs) and I couldn't help but think how really miraculous the Rotation Diet™ has been. Not only have I lost 62 pounds and hundreds of inches but I've been able enjoy all of the food that I love all during the diet—cheesecake, fettucine, ice cream sundaes, Tia Maria on the rocks—everything that I love. The Rotation Diet™ has transformed my life and it can do the same for you.

ROTATION DIET™
LOSERS ARE WINNERS
Pat—74 lbs. lost
Bill—31 lbs. lost in 30 days
Arleen—53 lbs lost Ann—40 lbs. lost

Nancy lost 25 lbs [illegible] 62 lbs Marianne 30 lbs

Dot's Statistics	THEN	NOW
WEIGHT	185	123
WAIST	34	27
HIPS	43	37
CHEST	35	35
NECK	13	11
THIGHS	22	18½
CALF	13	11
UPPER ARM	12	10

The Rotation Diet™ will work for YOU!

Now 21 pounds lighter

Here I am with the slacks I used to wear

Here's How . . .

Tuesday, Thursday, Saturday and Sunday are "FREE DAYS". You'll eat and drink what you like—good food or junk food—anything you want. Not just ice cream, but a sundae with fudge sauce, with whipped cream, with nuts. A cheeseburger and french fries (double order if you're hungry). Pretzels and beer!

Imagine! Everything you want to eat in whatever quantities you choose! Absolutely no limitations!

- Four "FREE DAYS" every week. You're eating the way you like to eat.
- "FREE DAYS" are your "reward days."

They make the difference between your staying on the diet and giving it up. Most people give up diets because they feel deprived of favorite foods, because they're bored with the same foods, or bothered counting calories, or tired of purchasing special foods. There's none of that with the Rotation Diet.™

- The Rotation Diet™ is the diet you can live with and stick with. After you near your goal weight, you'll get more and more "FREE DAYS" each week—up to six out of seven!

The Rotation Diet™ is the "no one has to know you're on a diet" Diet. That's because of its wonderful switching day program. It lets you make all special days into "FREE DAYS" without messing up your diet.

- celebrate birthdays with the cake at parties join in the eating and drinking
- dine in restaurants knowing you can choose anything on the menu—and still stay on your diet
- stuff the stocking at Christmas, then fill yourself

It won't be hard for you to remember your "FREE DAYS". But to help you highlight these feast days, you'll find in your Rotation Diet™ kit a supply of brightly colored "FREE DAY" stickers for your calendar. When you look at the month, you'll see that "FREE DAYS" far outnumber the rest.

And it saves you more than it costs!

LOSE WEIGHT FEELING GREAT

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This is what makes the Rotation Diet™ *the diet you can live with*. You see, on *FREE DAYS* you really live it up. You'll have a feast, satisfy all your cravings. The next day you won't have trouble doing without your favorite foods. Because you'll know you can have as much as you want of them—and anything else—in less than 24 hours. And remember, every Tuesday, Thursday, Saturday and Sunday are Free Days! The Rotation Diet™ doesn't have fast days. The "feed and fast" method of dieting doesn't work. It often causes dizziness and fatigue. And when hunger pangs come, most people end up eating on their fast days.

The Rotation Diet™ gives you BALANCE DAYS

- On Balance Days you'll have Rotation Wafers,™ Rotation Multi-Vitamins™ and a number of Rotation foods. In addition, you'll have unlimited, private consultation by phone with the Rotation Diet Center and your Phonefriend—a very important part of your diet.
- *Rotation Wafers™ makes the diet work.* They're critical to the success of the diet because they STOP HUNGER (yet they're not a medicine, drug or shot, so they're perfectly safe)
PROVIDE ENERGY (through a unique combination of healthful, high energy, natural ingredients)
ELIMINATE FATIGUE (you can do whatever you want on a Balance Day from early morning til late at night)
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- *You'll save more than you spend on this diet!* Most people cut about 40% off their food bill because they've cut down on expensive foods during their three Balance Days a week. That more than covers the cost of The Rotation Diet.™ And, with the Rotation Diet,™ there are no office visits or expensive consultations. You get unlimited telephone support included in your low weekly charge.

Answers to your questions

Q. How much weight can I expect to lose?

A. Women usually lose four to 16 pounds a month, men 10 to 20. The amount depends on many personal variables including the total amount of weight you have to lose. (Example: We have had men and women lose over 40 lbs. in one month.) Most important, you'll be doing it the safe way without harmful drugs. And you won't be bothered by fatigue.

Q. Will The Rotation Diet™ help me maintain my weight loss?

A. Once you come near your correct weight, the Wednesday Balance Day is eliminated. And when you reach your exact goal weight you then eliminate either Monday or Friday [illegible] Day. The Rotation Maintenance Program means you have six *FREE DAYS* each week and just one Balance Day.

Q. What are Rotation Wafers™ made of?

A. They contain only natural ingredients specially formulated to make The Rotation Diet™ work. The ingredients are toasted soy flour, pure honey, non fat dry milk solids and/or malted milk, soy oil, cocoa and/or carob, and vanilla powder. The nutritive value of each wafer is .45 grams protein, 1.1 gram carbohydrate and 1 gram fat. Total calories per wafer: Just 8 calories!

Q. Can I buy Rotation Wafers™ at my drug store?

A. No. They're manufactured exclusively for the Rotation Diet™ Center and are available only from us.

Q. Is The Rotation Diet™ medically safe?

A. You take no drugs or medicines for The Rotation Diet.™ However, we do encourage you to discuss The Rotation Diet™ with your physician before going on this or any diet.

Q. If I stop The Rotation Diet™ for a while, can I come back on?

A. Absolutely. Your membership is a Lifetime membership with a one time only Registration Fee. Just give us a call, toll free, and we'll resume shipping you supplies.

Here's what you get in your Rotation Diet kit:

- Rotation Wafers™ 2 or 4 week supply. You choose the starting amount on your membership application.
- Rotation Multi-Vitamins™ A full 2 week or 4 week supply.
- Instruction Handbook. All you need to know, including the number of Rotation Wafers™ personally allotted for you, how to switch days, how to add *FREE DAYS* and much more.
- Stickers for your *FREE DAYS*
- Calendar for the year. Record your weight loss, watch the numbers drop.

PLUS—UNLIMITED TELEPHONE CONTACT WITH THE ROTATION DIET CENTER AND YOUR PHONEFRIENDS.

Here's what you'll enjoy as a Lifetime Member of the Rotation Diet Center

- Free telephone contact whenever you want, as often as you like—whether you're on the diet, on a maintenance program or not receiving supplies at all.
- Free subscription to the Partyline newsletter.

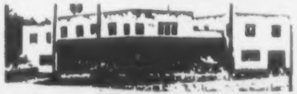
Call the Rotation Diet Center for more information

TOLL-FREE
(800) 823-6282 Seven days 9-9
In Pa. Call (215) 784-3278 Seven days 9-9
Call a Phonefriend days, evenings including weekends

Call the Rotation Diet Center and use your credit card today (9-9 Eastern Time). Your order is processed and on its way in ONE day!

One day service—Fast and personal

Shipping Department



Rotation Center

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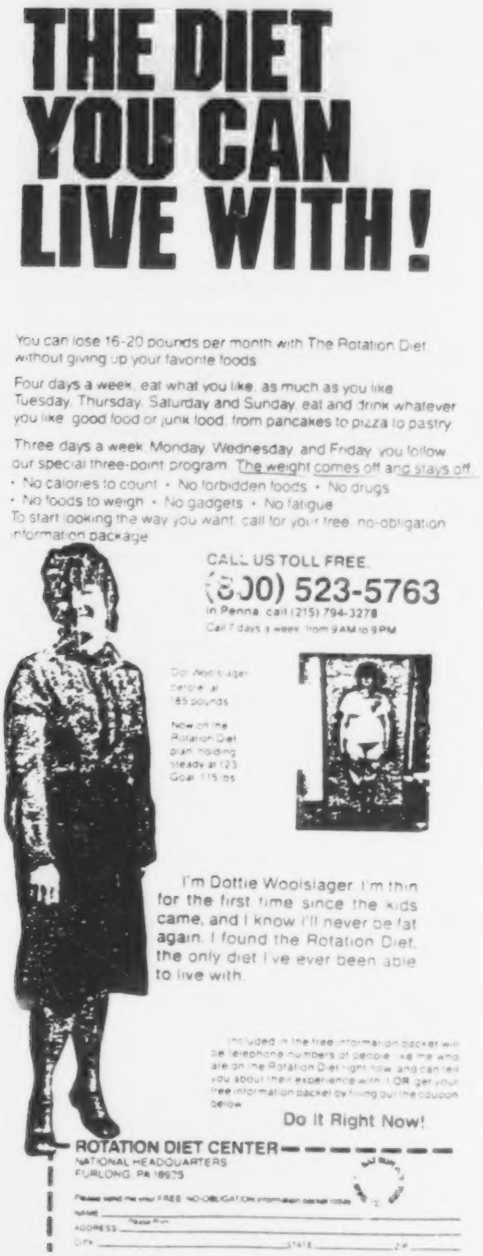
Amended Complaint

EXHIBIT E



THE DIET YOU CAN LIVE WITH!

You can lose 16-20 pounds per month with The Rotation Diet without giving up your favorite foods.

Four days a week, eat what you like, as much as you like. Tuesday, Thursday, Saturday and Sunday, eat and drink whatever you like, good food or junk food, from pancakes to pizza to pastry.

Three days a week, Monday, Wednesday, and Friday, you follow our special three-point program. The weight comes off and stays off.

- No calories to count • No forbidden foods • No drugs
- No foods to weigh • No gadgets • No fatigue

To start looking the way you want, call for your free, no-obligation information package.

CALL US TOLL FREE.

(800) 523-5763

In Penna. call (215) 794-3278

Call 7 days a week, from 9 AM to 9 PM

Dot Woolslager before at 185 pounds.

Now on the Rotation Diet plan, holding steady at 123. Goal 115 lbs.

I'm Dottie Woolslager. I'm thin for the first time since the kids came, and I know I'll never be fat again. I found the Rotation Diet, the only diet I've ever been able to live with.

Included in the free information packet will be telephone numbers of people like me who are on the Rotation Diet right now and can tell you about their experience with it. OR get your free information packet by filling out the coupon below.

Do It Right Now!

ROTATION DIET CENTER

NATIONAL HEADQUARTERS

FURLONG, PA 18925

Please send me your FREE, NO-OBLIGATION information packet today.

NAME ______________________

Please Print

ADDRESS ______________________

CITY ______________ STATE ______ ZIP ______

EXHIBIT F

Rotation Diet

Buckingham
Direct Response Advertising
Buckingham, PA 18912-0102 • (215) 794-5914

SCRIPT FOR BUCKINGHAM PRODUCTS
60 SECOND DIET SPOT

PLEASE GET A PENCIL AND STAND BY.

I'M GOING TO TELL YOU ABOUT AN EXCITING NEW DIET THAT IS SWEEPING THE COUNTRY. THERE ARE NOW OVER 100,000 PEOPLE ON THE ROTATION DIET---AND THESE PEOPLE ARE LOSING POUNDS WHILE EATING WHATEVER THEY WANT 4 DAYS EVERY WEEK.

THAT'S RIGHT! ON THE ROTATION DIET EVERY TUESDAY, THURSDAY, SATURDAY AND SUNDAY ARE FREE DAYS WHEN YOU ARE ENTIRELY FREE TO EAT WHATEVER YOU WANT---AND AS MUCH AS YOU WANT. THE OTHER 3 DAYS YOU OPERATE ON A PERSONALIZED DIET THAT KEEPS YOUR ENERGY HIGH AND YOUR HUNGER LOW AND YOU'RE NEVER MORE THAN TOMORROW MORNING AWAY FROM BEING ABLE TO HAVE WHATEVER YOU WANT. FOR A FREE BROCHURE CALL NOW TOLL FREE.

800-523-62-62

THAT'S

800-523-62-62

ONCE AGAIN, FOR A FREE BROCHURE CALL

800-523-62-62

SEE OUR AD IN THIS WEEK'S TV GUIDE

Amended Complaint

EXHIBIT G

Take-A-Break Tablets® help to maintain your current weight up to 15 days if you must "Take-A-Break" from your Rotation Diet®

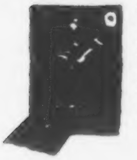
That's right! You can now enjoy up to 15 consecutive Free Days without regaining the weight that you have lost!

We know that there are times when it's impossible to diet – *even Rotation Diet™*

- Vacations with meals paid in advance
- Last-second business dinners
- When you're sick in the hospital
- Just a feeling that you can't argue with
- All sorts of pleasant times, emotional times, hard times – when it's just not the time to diet

NO DRUGS OR MEDICINE

Take-A-Break Tablets® are specially formulated to work with the Rotation Diet® and help to keep food from turning to fat. This means that for one day, two days, any number up to 15 days, you can enjoy taking a break from your Rotation Diet®. Soon as you return – get back on the Rotation Diet® and in one week or less you'll be back at your "Pre-Break" weight. It takes 1 to 3 balance days to rid your body of the food that was accumulated during "Break Time."



Order Now...

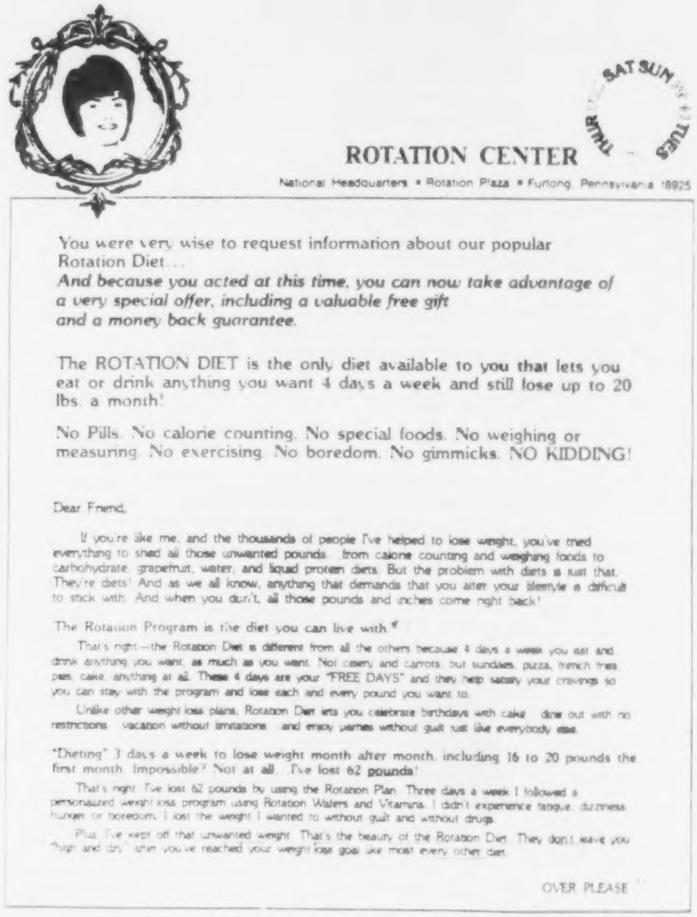
You should have a supply of **Take-A-Break Tablets®** On Hand for those situations that develop at the last minute!
Don't worry about keeping the tablets around – they have unlimited life!

COST

Per Day	**$ 3.25**
15 Days	**$48.75**

(Includes postage and handling)

EXHIBIT H



SAT SUN
TUES
THUR

ROTATION CENTER

National Headquarters • Rotation Plaza • Furlong, Pennsylvania 18925

You were very wise to request information about our popular Rotation Diet...
And because you acted at this time, you can now take advantage of a very special offer, including a valuable free gift and a money back guarantee.

The ROTATION DIET is the only diet available to you that lets you eat or drink anything you want 4 days a week and still lose up to 20 lbs. a month!

No Pills. No calorie counting. No special foods. No weighing or measuring. No exercising. No boredom. No gimmicks. NO KIDDING!

Dear Friend,

If you're like me, and the thousands of people I've helped to lose weight, you've tried everything to shed all those unwanted pounds... from calorie counting and weighing foods to carbohydrate, grapefruit, water, and liquid protein diets. But the problem with diets is just that. They're diets! And as we all know, anything that demands that you alter your lifestyle is difficult to stick with. And when you don't, all those pounds and inches come right back!

The Rotation Program is the diet you can live with!

That's right—the Rotation Diet is different from all the others because 4 days a week you eat and drink anything you want, as much as you want. Not celery and carrots, but sundaes, pizza, french fries, pies, cake, anything at all. These 4 days are your "FREE DAYS" and they help satisfy your cravings so you can stay with the program and lose each and every pound you want to.

Unlike other weight loss plans, Rotation Diet lets you celebrate birthdays with cake... dine out with no restrictions... vacation without limitations... and enjoy parties without guilt just like everybody else.

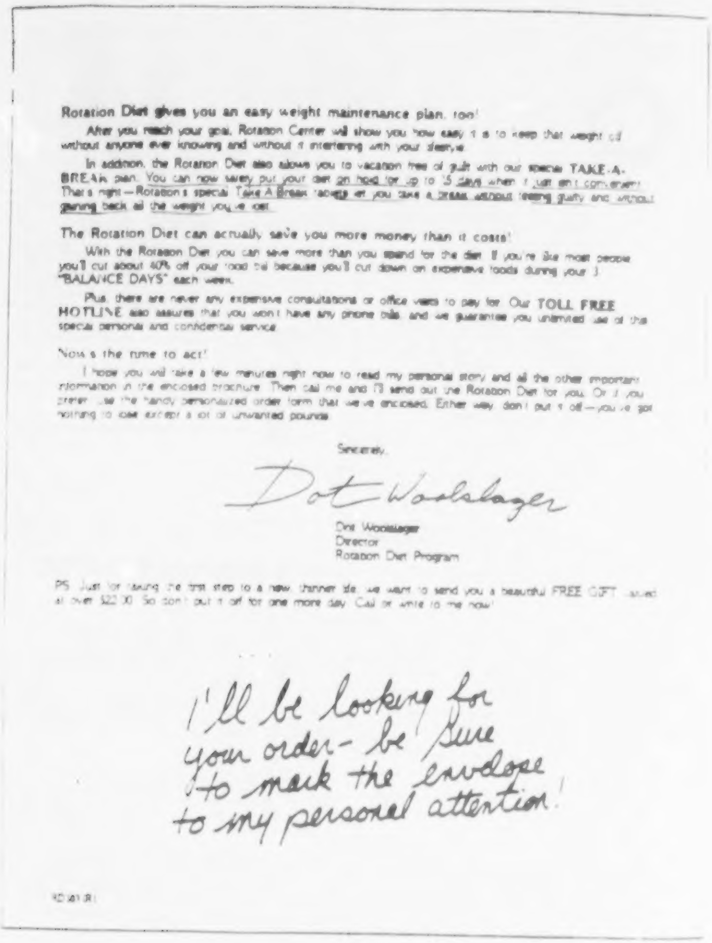
"Dieting" 3 days a week to lose weight month after month, including 16 to 20 pounds the first month. Impossible? Not at all... I've lost 62 **pounds**!

That's right. I've lost 62 pounds by using the Rotation Plan. Three days a week I followed a personalized weight loss program using Rotation Wafers and Vitamins. I didn't experience fatigue, dizziness, hunger or boredom. I lost the weight I wanted to without guilt and without drugs.

Plus, I've kept off that unwanted weight. That's the beauty of the Rotation Diet. They don't leave you "high and dry" after you've reached your weight loss goal like most every other diet.

OVER PLEASE

Amended Complaint



Rotation Diet gives you an easy weight maintenance plan, too!

After you reach your goal, Rotation Center will show you how easy it is to keep that weight off without anyone ever knowing and without it interfering with your lifestyle.

In addition, the Rotation Diet also allows you to vacation free of guilt with our special TAKE-A-BREAK plan. You can now safely put your diet on hold for up to 15 days when it just isn't convenient. That's right—Rotation's special Take A Break lets you take a break without feeling guilty and without gaining back all the weight you've lost.

The Rotation Diet can actually save you more money than it costs!

With the Rotation Diet you can save more than you spend for the diet. If you're like most people you'll cut about 40% off your food bill because you'll cut down on expensive foods during your 3 "BALANCE DAYS" each week.

Plus, there are never any expensive consultations or office visits to pay for. Our TOLL FREE HOTLINE also assures that you won't have any phone bills, and we guarantee you unlimited use of this special personal and confidential service.

Now's the time to act!

I hope you will take a few minutes right now to read my personal story and all the other important information in the enclosed brochure. Then call me and I'll send out the Rotation Diet for you. Or if you prefer, use the handy personalized order form that we've enclosed. Either way, don't put it off—you've got nothing to lose except a lot of unwanted pounds.

Sincerely,

Dot Woolslager

Dot Woolslager
Director
Rotation Diet Program

PS: Just for taking the first step to a new, thinner life, we want to send you a beautiful FREE GIFT valued at over $22.00. So don't put it off for one more day. Call or write to me now!

I'll be looking for
your order - be sure
to mark the envelope
to my personal attention!

RD 41 (R)

EXHIBIT I

Dot Woolslager (left) less 62 lbs. and Judy Ruthrauff minus 23 lbs., company executives at Rotation Center and long time users of Rotation Diet and its Maintenance Plan.

Dot and Judy Introduce the "NO FRILLS" Rotation Diet...

It's the real thing—not an imitation!

Because of overwhelming product interest, we've created a low cost "No Frills" version of our unique Rotation Diet Program. **You still eat anything you want 4 days a week, and you still lose weight.** It's still the diet you can live with because you're never more than 24 hours away from eating all the foods you love.

How Is This Possible?

You can now get this very popular, successful diet at a substantially reduced cost because

- there is no membership fee
- there are no expensive movie stars advertising our diet
- there are no expensive TV or radio commercials
- there's no newsletter
- there's no fancy packaging
- there are no "free" gifts to increase the cost
- there's no free "800" phone number
- and there are no separate vitamins—you chose your own multi-vitamin

Everything else about the Rotation Diet remains the same—you sacrifice nothing when it comes to losing weight!

Compare Rotation Diet With Others You See Advertised

Do these other "miracle" diets require you to count calories? Prepare special foods? Do special exercises? Take some sort of drug? Do without your favorite foods for weeks at a time? Make you spend money and waste valuable time at weight reduction sessions?

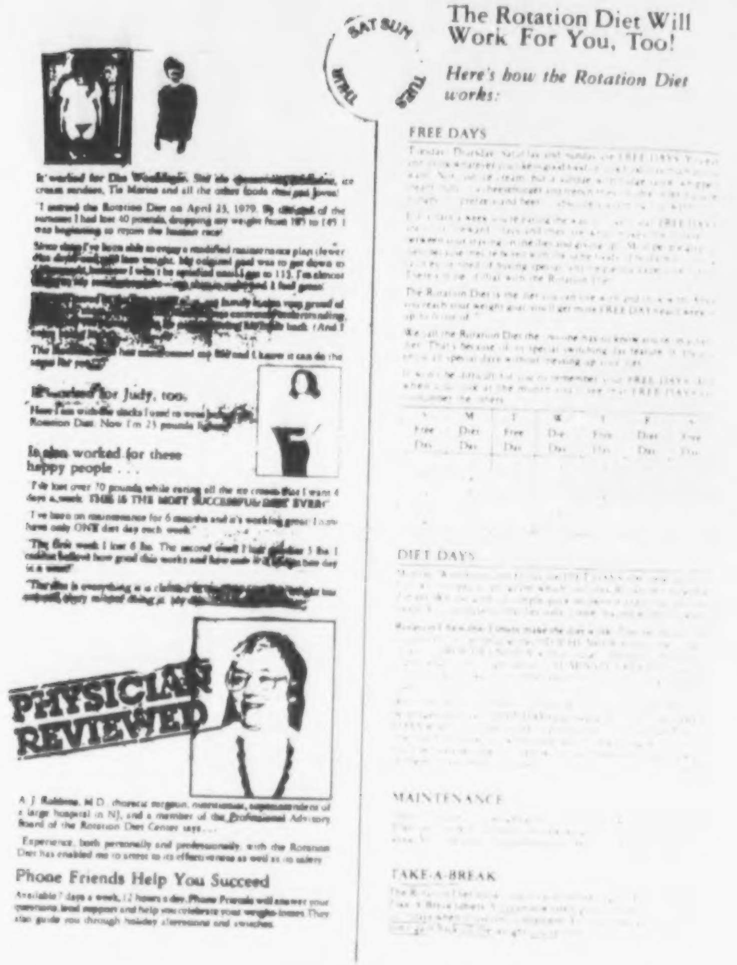
Rotation Diet doesn't make you do any of these!

Please take a few minutes right now to read the enclosed details on this "NO FRILLS" Rotation Diet Plan. You'll see that it works just like the original Plan. It's just as safe, just as effective and just as easy! Best of all, you can now try it for as little as $19.98 ... go ahead—ORDER TODAY What do you have to lose besides pounds?

Dot Woolslager Judy Ruthrauff

If you're still not convinced give us a call. We'll talk with you personally and answer any questions you have!

[illegible]103-33



SAT SUN
TUES
THUR

The Rotation Diet Will Work For You, Too!

Here's how the Rotation Diet works:

FREE DAYS

S	M	T	W	T	F	S
Free Day	Diet Day	Free Day	Diet Day	Free Day	Diet Day	Free Day

DIET DAYS

MAINTENANCE

TAKE-A-BREAK

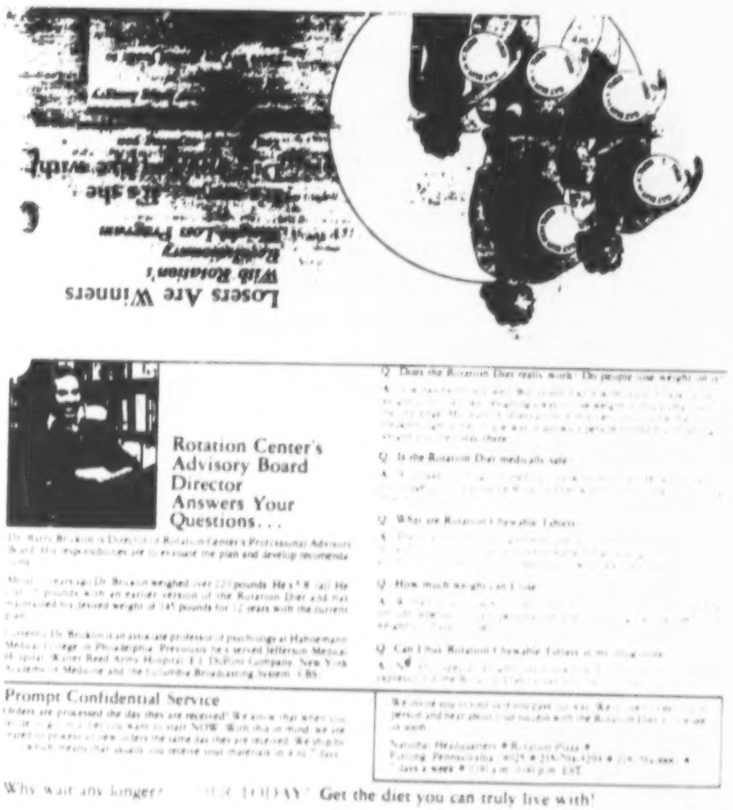
It worked for Judy, too.

It also worked for these happy people . . .

"THIS IS THE MOST SUCCESSFUL DIET EVER!"

PHYSICIAN REVIEWED

Phone Friends Help You Succeed



Losers Are Winners
With Rotation's
Revolutionary
Weight Loss Program

Rotation Center's Advisory Board Director Answers Your Questions. . .

Dr. Barry Bricklin is Director of Rotation Center's Professional Advisory Board. His responsibilities are to evaluate the plan and develop recommendations.

About [illegible] years ago Dr. Bricklin weighed over 220 pounds. He's 5'8" tall. He lost 75 pounds with an earlier version of the Rotation Diet and has maintained his desired weight at 145 pounds for 12 years with the current plan.

Currently Dr. Bricklin is an associate professor of psychology at Hahnemann Medical College in Philadelphia. Previously he's served Jefferson Medical Hospital, Walter Reed Army Hospital, E.I. DuPont Company, New York Academy of Medicine and the Columbia Broadcasting System (CBS).

Q Does the Rotation Diet really work? Do people lose weight on it?

A [illegible]

Q Is the Rotation Diet medically safe?

A [illegible]

Q What are Rotation Chewable Tablets?

A [illegible]

Q How much weight can I lose?

A [illegible]

Q Can I buy Rotation Chewable Tablets at my drug store?

A [illegible]

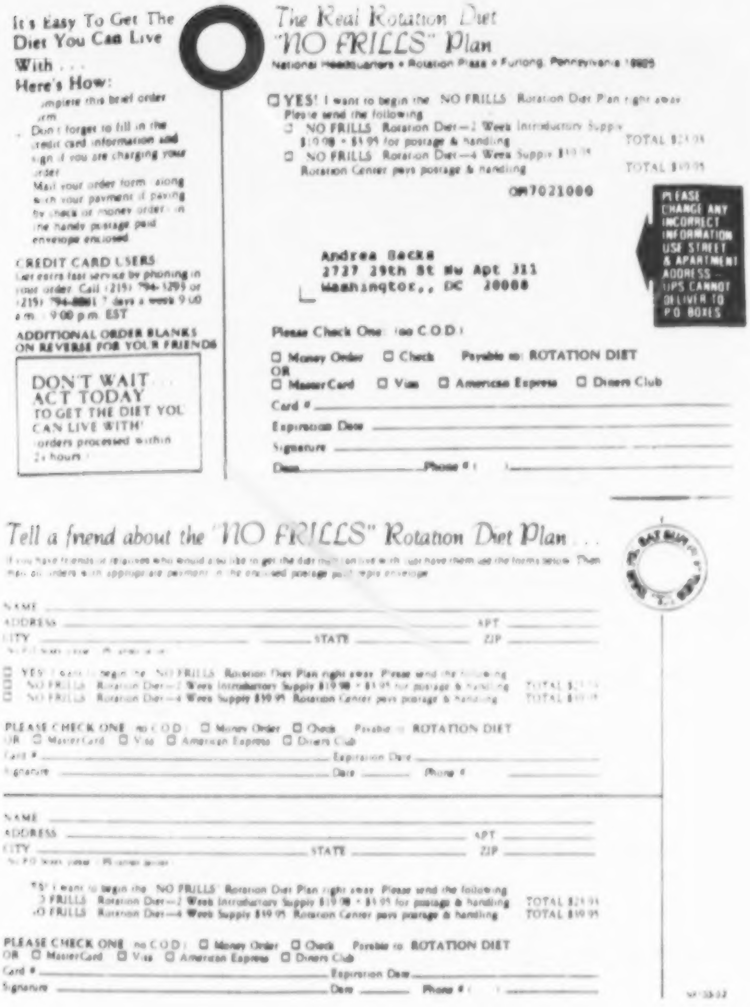
Prompt Confidential Service

Orders are processed the day they are received! We know that when you decide to go on a diet you want to start NOW! With this in mind, we are geared to process all new orders the same day they are received. We ship by [illegible] which means that usually you receive your materials in 4 to 7 days.

We invite you to visit us if you pass our way. We [illegible] person and hear about your success with the Rotation Diet [illegible] us soon.

National Headquarters • Rotation Plaza •
Furlong, Pennsylvania 18925 • 215/794-[illegible] • 215/794-[illegible] •
7 days a week • [illegible] a.m. [illegible] p.m. EST

Why wait any longer? ORDER TODAY! Get the diet you can truly live with!



It's Easy To Get The Diet You Can Live With . . .

Here's How:

Complete this brief order form

Don't forget to fill in the credit card information and sign if you are charging your order

Mail your order form (along with your payment if paying by check or money order) in the handy postage paid envelope enclosed

CREDIT CARD USERS

Get extra fast service by phoning in your order. Call (215) 794-5295 or (215) 794-8881 7 days a week 9:00 a.m. - 9:00 p.m. EST

ADDITIONAL ORDER BLANKS ON REVERSE FOR YOUR FRIENDS

DON'T WAIT . . .
ACT TODAY
TO GET THE DIET YOU CAN LIVE WITH!
(orders processed within 24 hours)

The Real Rotation Diet
"NO FRILLS" Plan
National Headquarters • Rotation Plaza • Furlong, Pennsylvania 18925

☐ **YES!** I want to begin the "NO FRILLS" Rotation Diet Plan right away. Please send the following:
- ☐ "NO FRILLS" Rotation Diet—2 Week Introductory Supply $19.98 + $3.95 for postage & handling TOTAL $23.93
- ☐ "NO FRILLS" Rotation Diet—4 Week Supply $39.95 Rotation Center pays postage & handling TOTAL $39.95

OM7021000

Andrea Backs
2727 29th St Nw Apt 311
Washingtor,, DC 20008

PLEASE CHANGE ANY INCORRECT INFORMATION USE STREET & APARTMENT ADDRESS — UPS CANNOT DELIVER TO P.O. BOXES

Please Check One: (no C.O.D.)

☐ Money Order ☐ Check Payable to: ROTATION DIET
OR
☐ MasterCard ☐ Visa ☐ American Express ☐ Diners Club

Card # __________
Expiration Date __________
Signature __________
Date __________ Phone # ( ) __________

Tell a friend about the "NO FRILLS" Rotation Diet Plan . . .

If you have friends or relatives who would also like to get the diet that you can live with, just have them use the forms below. Then mail all orders with appropriate payment in the enclosed postage paid reply envelope.

NAME __________
ADDRESS __________ APT ______
CITY __________ STATE ______ ZIP ______
(No P.O. boxes please / UPS cannot deliver)

☐ YES! I want to begin the "NO FRILLS" Rotation Diet Plan right away. Please send the following:
☐ "NO FRILLS" Rotation Diet—2 Week Introductory Supply $19.98 + $3.95 for postage & handling TOTAL $23.93
☐ "NO FRILLS" Rotation Diet—4 Week Supply $39.95 Rotation Center pays postage & handling TOTAL $39.95

PLEASE CHECK ONE (no C.O.D.) ☐ Money Order ☐ Check Payable to ROTATION DIET
OR ☐ MasterCard ☐ Visa ☐ American Express ☐ Diners Club
Card # __________ Expiration Date __________
Signature __________ Date ______ Phone # ______

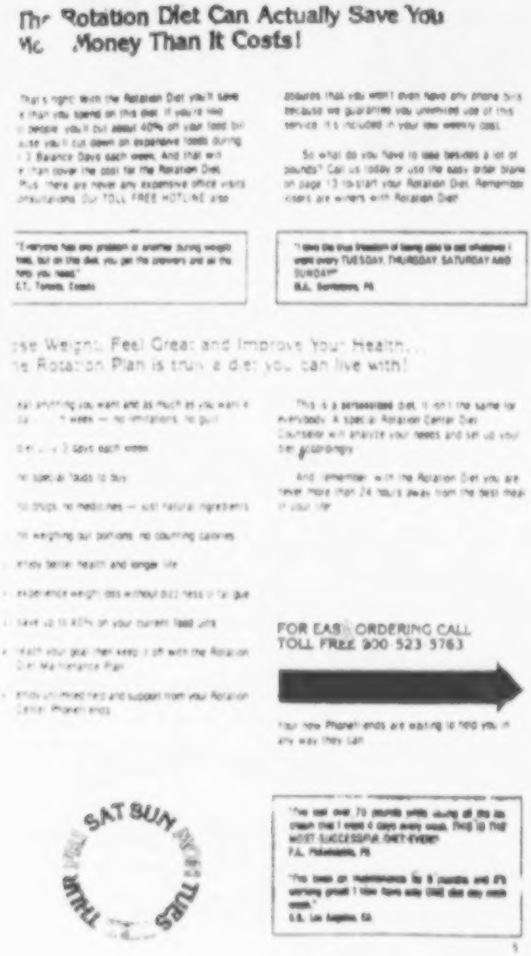
NAME __________
ADDRESS __________ APT ______
CITY __________ STATE ______ ZIP ______
(No P.O. boxes please / UPS cannot deliver)

☐ YES! I want to begin the "NO FRILLS" Rotation Diet Plan right away. Please send the following:
☐ "NO FRILLS" Rotation Diet—2 Week Introductory Supply $19.98 + $3.95 for postage & handling TOTAL $23.93
☐ "NO FRILLS" Rotation Diet—4 Week Supply $39.95 Rotation Center pays postage & handling TOTAL $39.95

PLEASE CHECK ONE (no C.O.D.) ☐ Money Order ☐ Check Payable to ROTATION DIET
OR ☐ MasterCard ☐ Visa ☐ American Express ☐ Diners Club
Card # __________ Expiration Date __________
Signature __________ Date ______ Phone # ( ) ______

SF-33-32

EXHIBIT J



SAT SUN
TUES
THUR

Th Rotation Diet Can Actually Save You Mc Money Than It Costs!

That's right! With the Rotation Diet you'll save e than you spend on this diet. If you're like t people, you'll cut about 40% off your food bil ause you'll cut down on expensive foods during r 3 Balance Days each week. And that will e than cover the cost for the Rotation Diet. Plus, there are never any expensive office visits onsultations. Our TOLL FREE HOTLINE also assures that you won't even have any phone bills because we guarantee you unlimited use of this service. It's included in your low weekly cost.

So what do you have to lose besides a lot of pounds? Call us today or use the easy order blank on page 13 to start your Rotation Diet. Remember: losers are winners with Rotation Diet!

"Everyone has one problem or another during weight loss, but on this diet, you get the answers and all the help you need."
E.T., Toronto, Canada

"I love the true freedom of being able to eat whatever I want every TUESDAY, THURSDAY, SATURDAY AND SUNDAY!"
B.A., [illegible], PA

ose Weight, Feel Great and Improve Your Health... he Rotation Plan is truly a diet you can live with!

- at anything you want and as much as you want 4 da h week — no limitations, no guilt
- Diet only 3 days each week
- no special foods to buy
- no drugs, no medicines — just natural ingredients
- no weighing out portions, no counting calories
- enjoy better health and longer life
- experience weight loss without dizziness or fatigue
- save up to 40% on your current food bills
- reach your goal then keep it off with the Rotation Diet Maintenance Plan
- enjoy unlimited help and support from your Rotation Center Phonefriends

This is a personalized diet. It isn't the same for everybody. A special Rotation Center Diet Counselor will analyze your needs and set up your diet accordingly.

And remember: with the Rotation Diet you are never more than 24 hours away from the best meal of your life.

FOR EASY ORDERING CALL
TOLL FREE 900-523-5763

Your new Phonefriends are waiting to help you in any way they can.

"I've lost over 70 pounds while eating all the ice cream that I want 4 days every week. This is the MOST SUCCESSFUL DIET EVER!"
P.A., Philadelphia, PA

"I've been on maintenance for 8 months and it's working great! I now have only ONE diet day each week."
S.B., Los Angeles, CA

5

CALL FOR MORE INFORMATION

TOLL FREE (800) 523-6262
In Penna. (215) 794-3278

Seven days a week from 9 A.M. to 11 P.M. (Eastern time)
there is a Phonefriend ready to answer your questions or take your order
Why not call now!

**A FRIEND CAN USE THE COUPON BELOW
TO ORDER AN INFORMATION PACKET LIKE THE ONE YOU RECEIVED**

Yes, I'm interested in finding out more about a diet that lets me eat whatever I want every **TUESDAY, THURSDAY, SATURDAY** and **SUNDAY**. Please send me the **Rotation Diet Information Packet**. I understand that the Packet is **FREE** and that there is absolutely no obligation!

Name ______________________________

Street address ______________________ Apt. ______

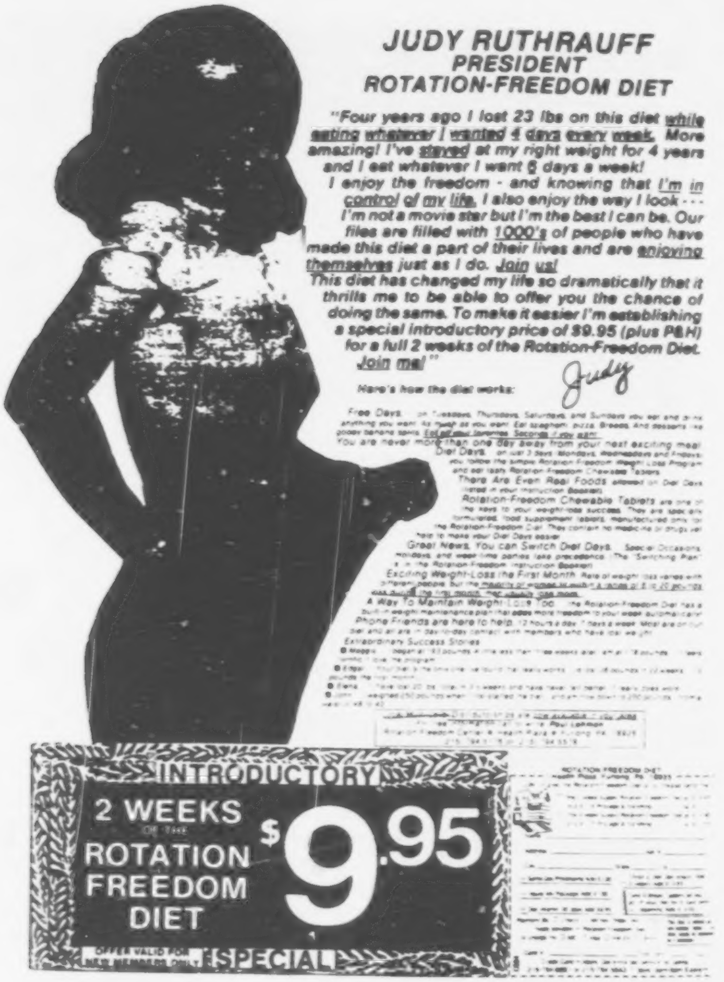
City ______________________ State ______ Zip ______

Telephone (optional) (____) ______________________
area code

Please fill out this **FREE** request form and mail it in an **envelope** to:
ROTATION DIET CENTER
Furlong, PA 18925
or call:
Toll Free **(800) 523-6262**
In Penna. **(215) 794-3278**

ROTATION REP NUMBER

EXHIBIT K



JUDY RUTHRAUFF
PRESIDENT
ROTATION-FREEDOM DIET

"Four years ago I lost 23 lbs on this diet while eating whatever I wanted 4 days every week. More amazing! I've stayed at my right weight for 4 years and I eat whatever I want 6 days a week!

I enjoy the freedom - and knowing that I'm in control of my life. I also enjoy the way I look - - - I'm not a movie star but I'm the best I can be. Our files are filled with 1000's of people who have made this diet a part of their lives and are enjoying themselves just as I do. Join us!

This diet has changed my life so dramatically that it thrills me to be able to offer you the chance of doing the same. To make it easier I'm establishing a special introductory price of $9.95 (plus P&H) for a full 2 weeks of the Rotation-Freedom Diet. Join me!"

Judy

Here's how the diet works:

Free Days.

You are never more than one day away from your next exciting meal

Diet Days.

There Are Even Real Foods

Rotation-Freedom Chewable Tablets

Great News. You can Switch Diet Days.

Exciting Weight-Loss the First Month.

A Way To Maintain Weight-Loss Too

Phone Friends are here to help.

Extraordinary Success Stories

INTRODUCTORY

2 WEEKS OF THE ROTATION FREEDOM DIET

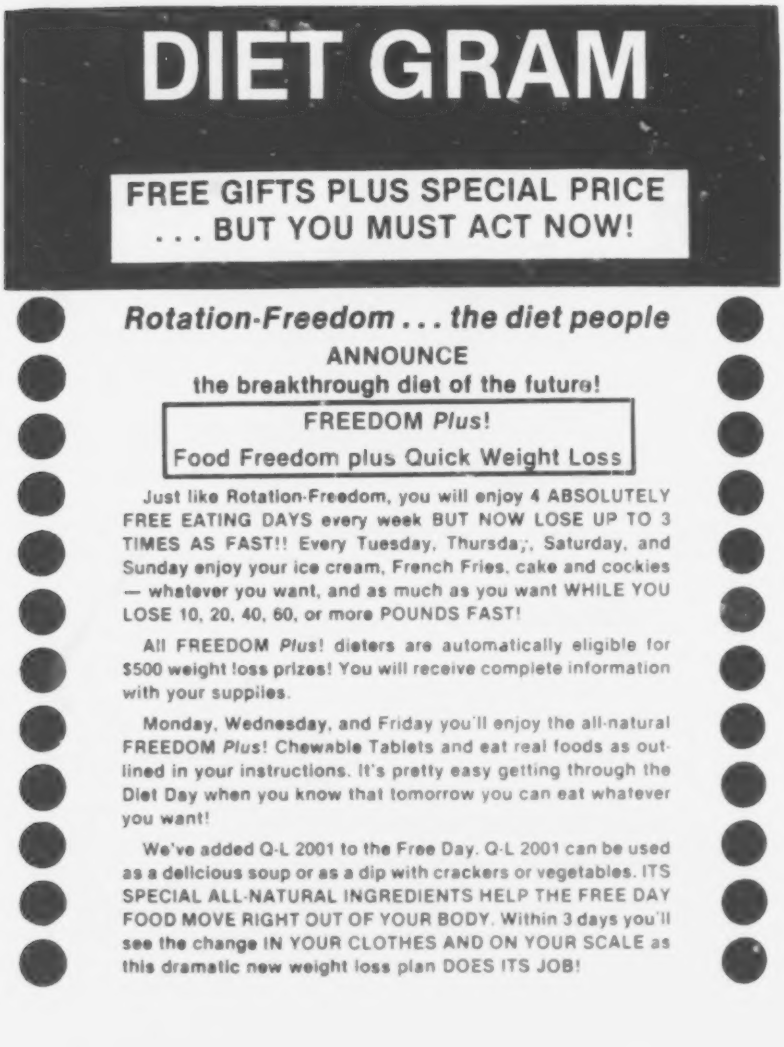
$9.95

OFFER VALID FOR NEW MEMBERS ONLY

SPECIAL!

ROTATION FREEDOM DIET

EXHIBIT L



DIET GRAM

FREE GIFTS PLUS SPECIAL PRICE . . . BUT YOU MUST ACT NOW!

Rotation-Freedom . . . the diet people

ANNOUNCE

the breakthrough diet of the future!

FREEDOM *Plus*!

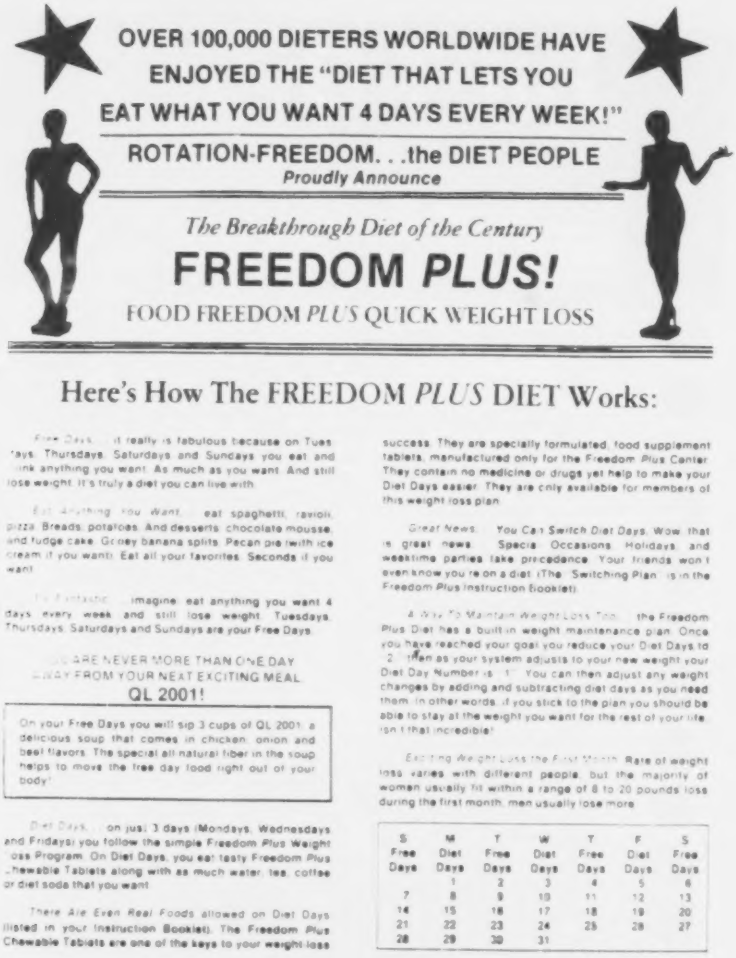
Food Freedom plus Quick Weight Loss

Just like Rotation-Freedom, you will enjoy 4 ABSOLUTELY FREE EATING DAYS every week BUT NOW LOSE UP TO 3 TIMES AS FAST!! Every Tuesday, Thursday, Saturday, and Sunday enjoy your ice cream, French Fries, cake and cookies — whatever you want, and as much as you want WHILE YOU LOSE 10, 20, 40, 60, or more POUNDS FAST!

All FREEDOM *Plus*! dieters are automatically eligible for $500 weight loss prizes! You will receive complete information with your suppiles.

Monday, Wednesday, and Friday you'll enjoy the all-natural FREEDOM *Plus*! Chewable Tablets and eat real foods as outlined in your instructions. It's pretty easy getting through the Diet Day when you know that tomorrow you can eat whatever you want!

We've added Q-L 2001 to the Free Day. Q-L 2001 can be used as a delicious soup or as a dip with crackers or vegetables. ITS SPECIAL ALL-NATURAL INGREDIENTS HELP THE FREE DAY FOOD MOVE RIGHT OUT OF YOUR BODY. Within 3 days you'll see the change IN YOUR CLOTHES AND ON YOUR SCALE as this dramatic new weight loss plan DOES ITS JOB!



OVER 100,000 DIETERS WORLDWIDE HAVE ENJOYED THE "DIET THAT LETS YOU EAT WHAT YOU WANT 4 DAYS EVERY WEEK!"

ROTATION-FREEDOM. . .the DIET PEOPLE

Proudly Announce

The Breakthrough Diet of the Century

FREEDOM *PLUS!*

FOOD FREEDOM *PLUS* QUICK WEIGHT LOSS

Here's How The FREEDOM *PLUS* DIET Works:

Free Days. . . it really is fabulous because on Tuesdays, Thursdays, Saturdays and Sundays you eat and drink anything you want. As much as you want. And still lose weight. It's truly a diet you can live with.

Eat Anything You Want. . . eat spaghetti, ravioli, pizza. Breads, potatoes. And desserts, chocolate mousse, and fudge cake. Gooey banana splits. Pecan pie (with ice cream if you want). Eat all your favorites. Seconds if you want.

It's Fantastic. . . imagine, eat anything you want 4 days every week and still lose weight. Tuesdays, Thursdays, Saturdays and Sundays are your Free Days.

YOU ARE NEVER MORE THAN ONE DAY AWAY FROM YOUR NEXT EXCITING MEAL

QL 2001!

On your Free Days you will sip 3 cups of QL 2001, a delicious soup that comes in chicken, onion and beef flavors. The special all natural fiber in the soup helps to move the free day food right out of your body!

Diet Days. . . on just 3 days (Mondays, Wednesdays and Fridays) you follow the simple Freedom *Plus* Weight Loss Program. On Diet Days, you eat tasty Freedom *Plus* Chewable Tablets along with as much water, tea, coffee or diet soda that you want.

There Are Even Real Foods allowed on Diet Days (listed in your Instruction Booklet). The Freedom *Plus* Chewable Tablets are one of the keys to your weight loss success. They are specially formulated, food supplement tablets, manufactured only for the Freedom *Plus* Center. They contain no medicine or drugs yet help to make your Diet Days easier. They are only available for members of this weight loss plan.

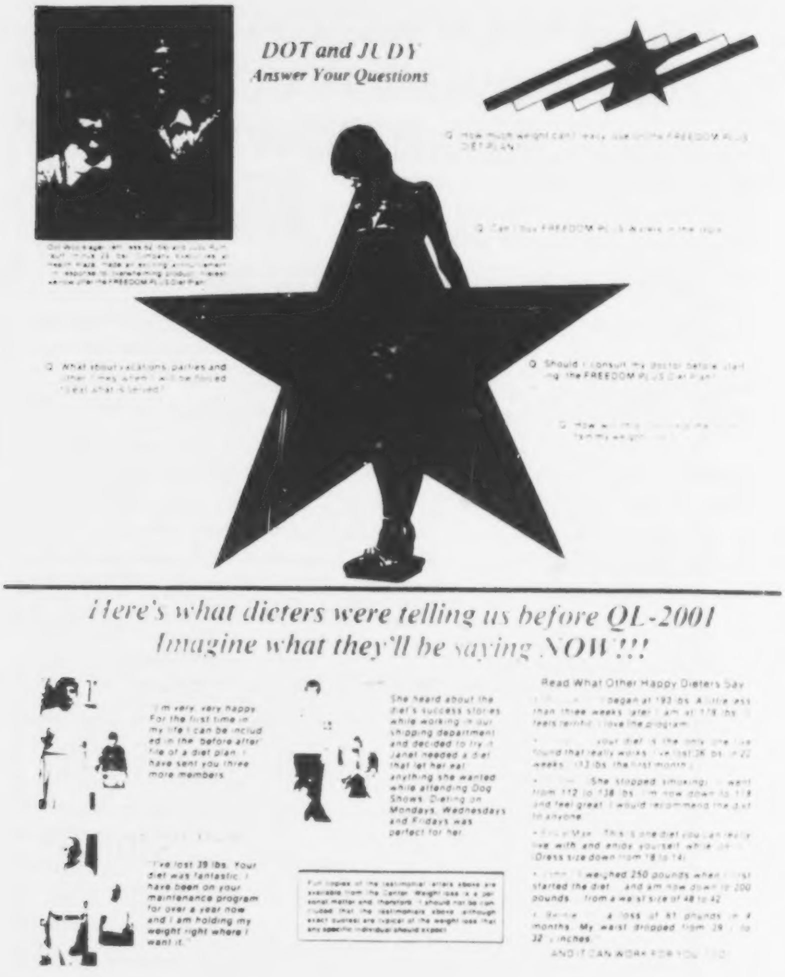
Great News. . . *You Can Switch Diet Days*. Wow, that is great news. Special Occasions, Holidays and weektime parties take precedence. Your friends won't even know you're on a diet. (The "Switching Plan" is in the Freedom *Plus* Instruction Booklet).

A Way To Maintain Weight Loss Too. . . the Freedom *Plus* Diet has a built in weight maintenance plan. Once you have reached your goal you reduce your Diet Days to "2", then as your system adjusts to your new weight your Diet Day Number is "1". You can then adjust any weight changes by adding and subtracting diet days as you need them. In other words, if you stick to the plan you should be able to stay at the weight you want for the rest of your life. Isn't that incredible!

Exciting Weight Loss the First Month. Rate of weight loss varies with different people, but the majority of women usually fit within a range of 8 to 20 pounds loss during the first month, men usually lose more.

S Free Days	M Diet Days	T Free Days	W Diet Days	T Free Days	F Diet Days	S Free Days
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

Amended Complaint



DOT and JUDY
Answer Your Questions

Q. How much weight can I really lose on the FREEDOM PLUS DIET PLAN?

Q. Can I buy FREEDOM PLUS [illegible] in the [illegible]

Q. What about vacations, parties and other times when I will be forced to eat what is served?

Q. Should I consult my doctor before starting the FREEDOM PLUS Diet Plan?

Q. How will [illegible]

Here's what dieters were telling us before QL-2001
Imagine what they'll be saying NOW!!!

"I'm very, very happy. For the first time in my life I can be included in the 'before after' file of a diet plan. I have sent you three more members."

She heard about the diet's success stories while working in our shipping department and decided to try it. Janet needed a diet that let her eat anything she wanted while attending Dog Shows. Dieting on Mondays, Wednesdays and Fridays was perfect for her.

"I've lost 39 lbs. Your diet was fantastic. I have been on your maintenance program for over a year now and I am holding my weight right where I want it."

Full copies of the testimonial letters above are available from the Center. Weight loss is a personal matter and, therefore, it should not be concluded that the testimonials above (although exact quotes) are typical of the weight loss that any specific individual should expect.

Read What Other Happy Dieters Say

[illegible] I began at 193 lbs. A little less than three weeks later I am at 178 lbs. [illegible] feels terrific. I love the program.

[illegible] your diet is the only one I've found that really works. I've lost 26 lbs. in 22 weeks. (13 lbs. the first month.)

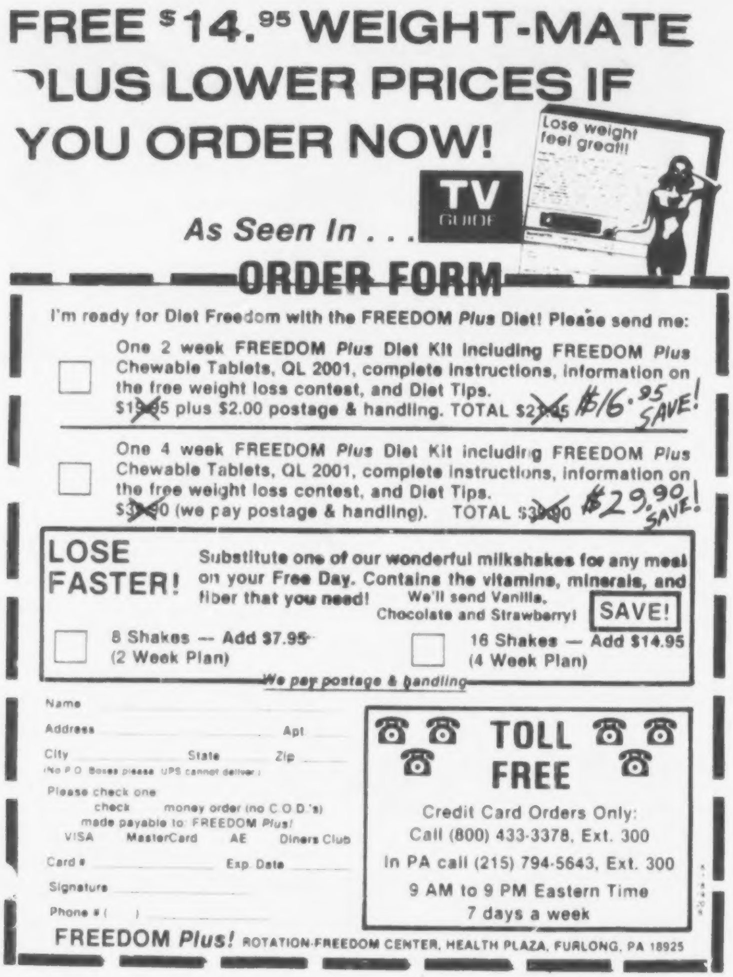
[illegible] (She stopped smoking) [illegible] went from 112 to 138 lbs. I'm now down to 119 and feel great. I would recommend the diet to anyone.

[illegible] Max. This is one diet you can really live with and enjoy yourself while [illegible] (Dress size down from 18 to 14)

[illegible] I weighed 250 pounds when I first started the diet [illegible] and am now down to 200 pounds [illegible] from a waist size of 48 to 42.

[illegible] Bernie [illegible] a loss of 61 pounds in 9 months. My waist dropped from 39 [illegible] to 32 [illegible] inches.

AND IT CAN WORK FOR YOU TOO!



FREE $14.95 WEIGHT-MATE PLUS LOWER PRICES IF YOU ORDER NOW!

Lose weight feel great!!

As Seen In . . . TV GUIDE

ORDER FORM

I'm ready for Diet Freedom with the FREEDOM *Plus* Diet! Please send me:

☐ One 2 week FREEDOM *Plus* Diet Kit including FREEDOM *Plus* Chewable Tablets, QL 2001, complete instructions, information on the free weight loss contest, and Diet Tips. $1~~9.9~~5 plus $2.00 postage & handling. TOTAL $2~~1.9~~5 $16.95 SAVE!

☐ One 4 week FREEDOM *Plus* Diet Kit including FREEDOM *Plus* Chewable Tablets, QL 2001, complete instructions, information on the free weight loss contest, and Diet Tips. $3~~9.9~~0 (we pay postage & handling). TOTAL $3~~9.9~~0 $29.90 SAVE!

LOSE FASTER! Substitute one of our wonderful milkshakes for any meal on your Free Day. Contains the vitamins, minerals, and fiber that you need! We'll send Vanilla, Chocolate and Strawberry! SAVE!

☐ 8 Shakes — Add $7.95 (2 Week Plan)

☐ 16 Shakes — Add $14.95 (4 Week Plan)

We pay postage & handling

Name

Address Apt

City State Zip

(No P.O. Boxes please. UPS cannot deliver.)

Please check one

check money order (no C.O.D.'s)

made payable to: FREEDOM *Plus!*

VISA MasterCard AE Diners Club

Card # Exp. Date

Signature

Phone # ( )

☎ ☎ TOLL FREE ☎ ☎ ☎ ☎

Credit Card Orders Only:

Call (800) 433-3378, Ext. 300

In PA call (215) 794-5643, Ext. 300

9 AM to 9 PM Eastern Time

7 days a week

FREEDOM *Plus!* ROTATION-FREEDOM CENTER, HEALTH PLAZA, FURLONG, PA 18925

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violations of sections 5 and 12 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Buckingham Productions, Inc., trading and doing business as Rotation Diet Center, is a Pennsylvania corporation with its principal office and place of business at 73 Valley Drive in Furlong, Pennsylvania.

Respondent Furlong-Elliot Corp. is a Pennsylvania corporation with its principal office and place of business at 73 Valley Drive in Furlong, Pennsylvania.

Respondent Freedom Center, Inc. is a Pennsylvania corporation with its principal office and place of business at 73 Valley Drive in Furlong, Pennsylvania.

Respondent Plaza Business Services, Inc. is a Pennsylvania corporation with its principal office and place of business at 73 Valley Drive in Furlong, Pennsylvania.

Respondent N.F. Rotation, Inc. is a Pennsylvania corporation with its principal office and place of business at 73 Valley Drive in Furlong, Pennsylvania.

Respondent Rotation-Freedom Diet, Inc. is a Pennsylvania corporation with its principal office and place of business at 73 Valley Drive in Furlong, Pennsylvania.

Respondent Health and Diet Corp., Inc. is a Pennsylvania corporation with its principal office and place of business at 73 Valley Drive in Furlong, Pennsylvania.

Respondent Howard Elliot is an officer of the corporate respondents. He formulates, directs and controls the acts and practices of the corporate respondents, and his address is the same as the corporate respondents.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceedings is in the public interest.

ORDER

I.

It is ordered, That respondents Buckingham Productions, Inc., also trading and doing business as Rotation Diet Center, Furlong-Elliot Corp., Freedom Center, Inc., Plaza Business Services, Inc., N.F. Rotation, Inc., and Rotation-Freedom Diet, Inc., and Health and Diet Corp., Inc., corporations, their successors and assigns, and their officers, and Howard Elliot, individually and as an officer of the corporations; and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, distributorship or other device, in connection with the advertising, offering for sale, sale or distribution of any weight-reduction or weight control product, program, or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(A) Representing, directly or by implication, that:

(1) Any consumer can eat any quantity of food and still lose weight or maintain that weight loss, without an accompanying and proximate, clear and prominent disclosure that the consumer's weight loss or ability to maintain that weight loss depends on a reduction in caloric intake in the short term and an overall reduction in caloric intake over the long term.

(2) Thousands of consumers, or any number of consumers, have lost or maintained a specified amount of weight loss, or range of weight loss, unless such is the case.

(3) Any such product, either alone or in conjunction with any weight reduction or weight control program or service, will stop hunger or otherwise function as an appetite suppressant, or will eliminate or prevent fatigue, unless such is the case.

(4) Any such product, either alone or in conjunction with any weight

reduction or weight control program or service, will help keep food from turning to fat, unless such is the case.

(B) Representing, directly or by implication, that any person has endorsed any such product, program or service, unless that person has committed that endorsement in writing and has authorized, in writing, its use in promotional or advertising materials, and unless respondents have good reason to believe that at the time of their representation that person continues to subscribe to the views presented.

(C) Failing to disclose any material connection, where one exists, between an endorser (except for a celebrity endorser) of any such product, program or service and any respondent; provided, however, that a *"material connection"* shall mean, for purposes of this order, any relationship between an endorser of any such product, program or service, and any entity marketing such product, program or service which relationship would not reasonably be expected by consumers and, if known by consumers, might materially affect the weight or credibility given to the endorsement.

(D) Representing, directly or by implication, the usual or average weight loss, or range of weight loss, obtained or obtainable from any such weight reduction or weight control product, program or service, unless at the time of making such representation respondents possess and rely upon competent and reliable survey or other scientific evidence that substantiates the representation.

(E) Making any representation, directly or by implication, regarding the efficacy, safety, or performance of any weight reduction or weight control product, program or service, the content or mode of action of any weight reduction or weight control product, program or service, or the monetary savings that may or will result from the purchase or use of such product, program or service, unless at the time of making such representation respondents possess and rely upon competent and reliable survey of other scientific evidence that substantiates the representation.

For purposes of Part I of this order, *"competent and reliable"* evidence shall mean tests, analyses, research, studies, surveys, or other evidence, conducted and evaluated by qualified persons in an objective manner and using generally accepted procedures.

II.

It is further ordered, That for three years from the date that the representations to which they pertain are last disseminated, respondent corporations, their successors and assigns, and their officers, and the individually named respondent, and respondents' agents, representatives and employees shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

1. All materials that were relied upon to substantiate any such representation.

2. All test reports, studies, surveys, or other materials in their possession or control that contradict, qualify, or call into question such representation.

III.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation(s) which may affect compliance obligations arising out of the order.

IV.

It is further ordered, That respondents and their successors or assigns, shall forthwith distribute a copy of this order to each of their operating divisions, to all officers, agents or representatives who are engaged in the preparation and placement of advertisements or promotional materials, to all employees who communicate with customers or potential customers as part of their employment responsibilities, and to all distributors of products manufactured or marketed by respondents.

V.

It is further ordered, That the individual respondent named herein shall promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment and that, for a period of 10 years from the date of service of this order, the individual respondent named herein shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the advertising, endorsing, promotion, offering for sale, sale, or distribution of any weight reduction or weight control product, program, or service, and of his affiliation with a new business or employment in which his own duties and responsibilities involve the advertising, endorsing, promotion, offering for sale, sale, or distribution of any weight reduction or weight control product, program or service, with each such notice to include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment.

VI.

It is further ordered, That respondents and their successors or assigns, shall, within sixty (60) days after service of this order, and also one (1) year thereafter, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Commissioner Bailey was recorded as voting in the negative.

IN THE MATTER OF

PURITAN-BENNETT AERO SYSTEMS COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3217. Complaint, Aug. 25, 1987—Decision, Aug. 25, 1987

This consent order prohibits, among other things, an El Segundo, California seller of fire and smoke protection masks from making deceptive advertising claims that any emergency escape mask or hood can absorb, remove or filter out any hazardous gas associated with fire, or that any mask or hood can protect users from any fire hazards, unless the claim is substantiated and supported by a scientific test. Respondent is required to retain for three years all test reports or materials it uses as substantiation for claims and is also required to make specified disclosures on its packaging and in advertisements.

Appearances

For the Commission: *Joel Winston* and *Susan Cohn.*

For the respondents: *Daniel C. Weary and Robin Foser, Blackwell, Sanders, Matheny, Weary, & Lombardi,* Kansas City, Mo.

COMPLAINT

The Federal Trade Commission, having reason to believe that Puritan-Bennett Aero Systems Company, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Puritan-Bennett Aero Systems Company is a California corporation with its office and principal place of business at 111 Penn Avenue, El Segundo, California. It is a wholly-owned subsidiary of Puritan-Bennett Corporation.

PAR. 2. Puritan-Bennett Aero Systems has been engaged in the advertising, marketing, distribution and sale to the public of the Escape Fire and Smoke Hood ("Escape Hood" or "Hood").

PAR. 3. The acts and practices of Puritan-Bennett Aero Systems alleged in this complaint have been in or affecting commerce.

PAR. 4. Typical of Puritan-Bennett Aero Systems' advertising and promotional material for the Escape Hood, but not necessarily all inclusive thereof, is the attached Exhibit A. The aforesaid material contains the following statements:

a. "IN CASE OF FIRE: ESCAPE! Introducing ESCAPE Fire and Smoke Hood, the best way to increase your chance of surviving a fire."

b. "ESCAPE is designed to protect eyesight, minimize panic and filter out toxic fumes for a reasonable amount of time. With this extra time, your chances for escape from fire are greatly enhanced."

c. "Fires can generate searing, intense heat. Worse they normally develop dense clouds of smoke. And the burning materials give off poisonous fumes. Without effective protection against these hazards, your chances for escape will be slim indeed. Now you can have that effective protection against fire and smoke! It's called ESCAPE, and it is . . . capable of . . . removing 99% of all smoke particles and absorbing most toxic gases."

PAR. 5. Through the use of the statements referred to in paragraph four and others in advertisements not specifically set forth herein, Puritan-Bennett Aero Systems has represented, directly or by implication, that:

a. The Escape Hood will absorb or filter out all significant noxious or poisonous gases associated with fires.

b. The Escape Hood will protect the user from all significant hazards associated with gases in fires for a reasonable amount of time.

PAR. 6. In truth and in fact:

a. The Escape Hood will not absorb or filter out all significant noxious or poisonous gases associated with fires, because it does not absorb or filter out carbon monoxide, a lethal gas associated with fires.

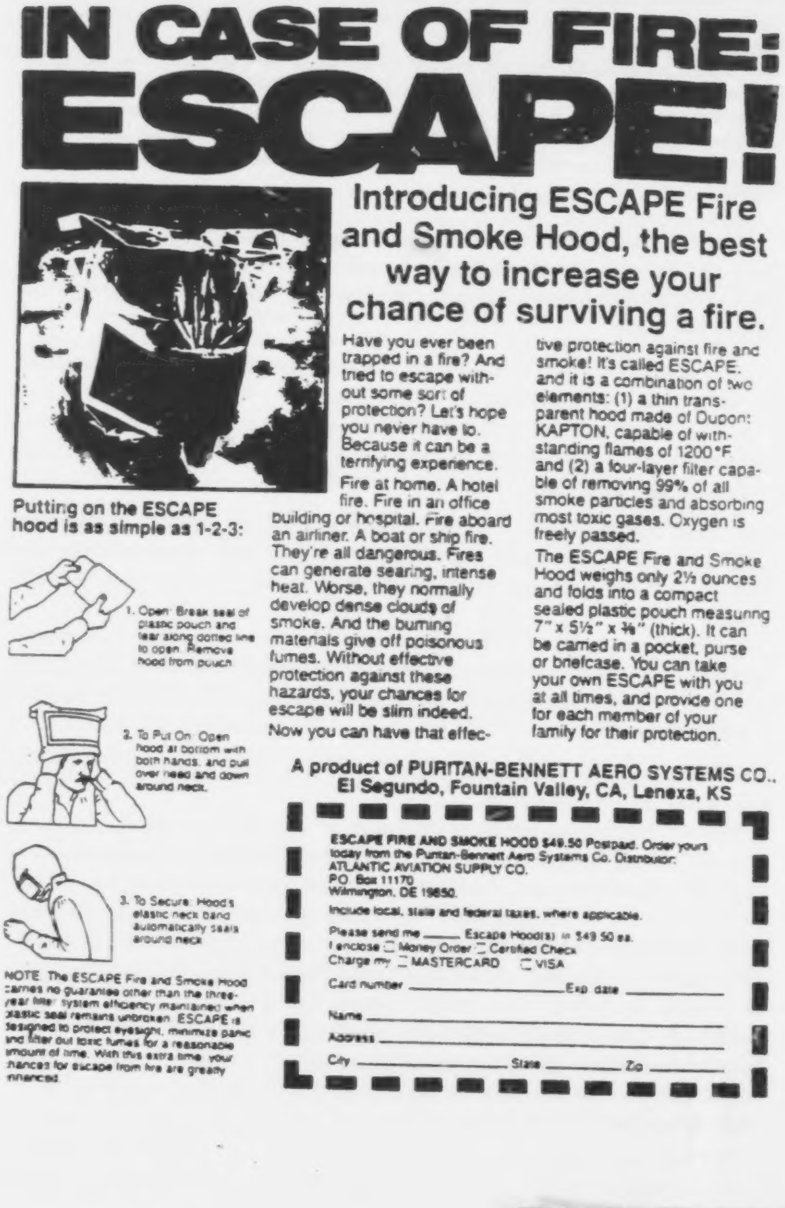
b. The Escape Hood will not protect the user from all significant hazards associated with gases in fires for a reasonable amount of time, because it does not absorb or filter out carbon monoxide, a lethal gas associated with fires.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. In the advertising and sale of the Escape Hood, Puritan-Bennett Aero Systems has failed to disclose adequately to consumers that the Hood does not absorb or filter out carbon monoxide, a lethal gas associated with fires. This fact would be material to consumers in their decisions on whether to purchase or how to use the Escape Hood. The failure to disclose this fact, in light of the representations made as alleged in paragraph five, is a deceptive practice.

PAR. 8. The acts and practices of Puritan-Bennett Aero Systems alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A



IN CASE OF FIRE: ESCAPE!

Introducing ESCAPE Fire and Smoke Hood, the best way to increase your chance of surviving a fire.

Have you ever been trapped in a fire? And tried to escape without some sort of protection? Let's hope you never have to. Because it can be a terrifying experience.

Fire at home. A hotel fire. Fire in an office building or hospital. Fire aboard an airliner. A boat or ship fire. They're all dangerous. Fires can generate searing, intense heat. Worse, they normally develop dense clouds of smoke. And the burning materials give off poisonous fumes. Without effective protection against these hazards, your chances for escape will be slim indeed.

Now you can have that effective protection against fire and smoke! It's called ESCAPE, and it is a combination of two elements: (1) a thin transparent hood made of Dupont KAPTON, capable of withstanding flames of 1200°F and (2) a four-layer filter capable of removing 99% of all smoke particles and absorbing most toxic gases. Oxygen is freely passed.

The ESCAPE Fire and Smoke Hood weighs only 2½ ounces and folds into a compact sealed plastic pouch measuring 7" x 5½" x ⅜" (thick). It can be carried in a pocket, purse or briefcase. You can take your own ESCAPE with you at all times, and provide one for each member of your family for their protection.

Putting on the ESCAPE hood is as simple as 1-2-3:

1. Open: Break seal of plastic pouch and tear along dotted line to open. Remove hood from pouch.
2. To Put On: Open hood at bottom with both hands, and pull over head and down around neck.
3. To Secure: Hood's elastic neck band automatically seals around neck.

NOTE: The ESCAPE Fire and Smoke Hood carries no guarantee other than the three-year filter system efficiency maintained when plastic seal remains unbroken. ESCAPE is designed to protect eyesight, minimize panic and filter out toxic fumes for a reasonable amount of time. With this extra time, your chances for escape from fire are greatly enhanced.

A product of PURITAN-BENNETT AERO SYSTEMS CO., El Segundo, Fountain Valley, CA, Lenexa, KS

ESCAPE FIRE AND SMOKE HOOD $49.50 Postpaid. Order yours today from the Puritan-Bennett Aero Systems Co. Distributor:

ATLANTIC AVIATION SUPPLY CO.
P.O. Box 11170
Wilmington, DE 19850.

Include local, state and federal taxes, where applicable.

Please send me _____ Escape Hood(s) @ $49.50 ea.
I enclose ☐ Money Order ☐ Certified Check
Charge my ☐ MASTERCARD ☐ VISA
Card number ____________________ Exp. date __________
Name ________________________________
Address ______________________________
City ______________ State ________ Zip ________

best copy available

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent, and its parent corporation, Puritan-Bennett Corporation, having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its parent corporation, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent and its parent corporation of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent or its parent corporation that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Puritan-Bennett Aero Systems Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its offices and principal place of business at 111 Penn Avenue, El Segundo, California.

2. Puritan-Bennett Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business at 9401 Indian Creek Parkway, P.O. Box 25905, Overland Park, Kansas.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the companies and the proceeding is in the public interest.

ORDER

I.

For the purpose of this order, the following definitions shall apply:

(1) *"The Escape Fire and Smoke Hood"* shall mean the over-the-head transparent Kapton hood manufactured by Cybertronics, Ltd., a British company.

(2) *"Competent and reliable scientific test"* shall mean a test in which persons with skill and expert knowledge in the field to which the test pertains conduct the test and evaluate its results in an objective manner using testing, evaluation, and analytical procedures that ensure accurate and reliable results.

II.

It is ordered, That respondent Puritan Bennett Aero Systems Company, a corporation, its parent corporation, Puritan-Bennett Corporation, their successors and assigns, (hereinafter collectively "the companies"), and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the Escape Fire and Smoke Hood or any other emergency escape mask or hood, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

a. That the mask or hood is capable of absorbing, removing, filtering out, or otherwise protecting the user from any hazardous gas associated with fire unless, at the time the representation is made, the representation is true and the companies possess and rely upon a reasonable basis consisting of a competent and reliable scientific test that substantiates the representation.

b. That the mask or hood can protect the user from any hazards associated with fire unless, at the time the representation is made, the representation is true and the companies possess and rely upon a reasonable basis consisting of a competent and reliable scientific test that substantiates the representation.

III.

It is further ordered, That the following notice shall be included in all advertising and promotional materials for the Escape Fire and Smoke Hood, or any other emergency mask or hood manufactured or sold by the companies that is incapable of absorbing, removing, filtering or otherwise providing significant protection from carbon monoxide, if that advertising or promotional material expressly or impliedly represents that the device protects the user from any hazard associated with fire:

NOTICE: This device does not filter carbon monoxide—a lethal gas associated with fire.

Nothing contrary to, inconsistent with, or in mitigation of the above required language shall be used in any such advertising or promotional material. In print advertising and promotional material, the above required language shall appear in at least ten-point bold type print, in close conjunction with the representation. In any television advertising, film, videotape or slide promotional material, the above required language shall be included both orally and visually in a manner designed to ensure clarity and prominence. In radio advertising, the above required language shall be read in a clear manner.

IV.

It is further ordered, That the following statement shall be included on all package labels for the Escape Fire and Smoke Hood, or any other emergency mask or hood manufactured or sold by the companies that is incapable of absorbing, removing, filtering or otherwise providing significant protection from carbon monoxide:

WARNING: This device does not filter carbon monoxide—a lethal gas associated with fire.

The above required language shall be printed in at least ten-point bold type print. Nothing contrary to, inconsistent with or in mitigation of the above required language shall be used on any such package label.

V.

It is further ordered, That the companies shall deliver by certified mail or in person a copy of this order to all present and future distributors and sub-distributors of the Escape Fire and Smoke Hood, or any other emergency mask or escape hood marketed by either of the companies, and instruct such distributors and sub-distributors in writing not to make any of the representations, directly or by implication, prohibited by this order. Delivery shall be made within thirty (30) days after the date of service on the companies of this order to all such present distributors and sub-distributors. For all such future distributors and sub-distributors, delivery shall be made prior to the time said distributors begin distribution of the product.

VI.

It is further ordered, That, for three years from the date that the representations are last disseminated, each company shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

1. All materials upon which the company relied to substantiate any claim or representation covered by this order, and
2. All test reports, studies, surveys, or other materials in its possession or control or of which it has knowledge that contradict, qualify, or call into question such representation or the basis upon which the company relied for such representation.

VII.

It is further ordered, That each company shall notify the Commission at least thirty (30) days prior to any proposed change in the company such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

VIII.

It is further ordered, that the companies shall, within sixty (60) days after service of this order upon them and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied or intend to comply with this order.

In the Matter of

ALLEGHANY CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3218. Complaint, Sept. 9, 1987—Decision, Sept. 9, 1987

This consent order allows, among other things, a New York City title insurance company to acquire Safeco Title Insurance Co. by requiring respondent to divest two title plants to alleviate concerns that acquisition could reduce competition in the production and sale of title information in Cook County, Ill. and Los Angeles County, Calif. Respondent is also required to continue to honor all Chicago Title and Trust Company and Safeco plant access contracts that expire pending divestiture.

Appearances

For the Commission: *Michael Antalics* and *Andrew Goodson.*

For the respondents: *John C. Christie, Jr., Bell, Boyd, & Lloyd,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Alleghany Corporation, a corporation subject to the jurisdiction of the Commission, through one of its subsidiaries, has entered into an agreement that violates Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. Section 45); that through this agreement Alleghany Corporation has agreed to acquire certain assets of Safeco Corporation; and that such acquisition, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. Section 18); and it appearing that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. Section 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. Section 45(b)), stating its charges as follows:

I. DEFINITION

1. For purposes of this Complaint, the term *"title plant"* means a privately owned set of records regarding the ownership of and interests in real property that is maintained by obtaining information from the public records on a daily or regular basis and is indexed, posted or otherwise organized to update data regarding specific land

parcels. The term *"title plant information"* means that information contained in and obtained from a title plant.

II. ALLEGHANY CORPORATION

2. Alleghany Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office at Park Avenue Plaza, New York, New York.

3. Alleghany is the sole owner of Chicago Title & Trust Company, which is the sole owner of Chicago Title Insurance Company ("Chicago Title").

4. At all times relevant herein, Alleghany Corporation has been and is a corporation whose business is in or affecting commerce within the meaning of the Federal Trade Commission and Clayton Acts, as amended.

III. ACQUISITION

5. On October 10, 1986, Chicago Title & Trust Company entered into an agreement with Safeco Corporation to acquire all of the outstanding shares of Safeco Title Insurance Company ("Safeco"), a wholly-owned subsidiary of Safeco Corporation.

IV. TRADE AND COMMERCE

6. The relevant sections of the country are Cook County, Illinois, and Los Angeles County, California.

7. The relevant line of commerce is the production and sale of title plant information.

8. There are two title plants in Cook County, one of which is wholly-owned by Safeto and one of which is wholly-owned by Chicago Title Insurance Company.

9. There are three title plants in Los Angeles County, one of which is wholly-owned by Safeco Title Insurance Company and one of which is owned jointly by Chicago Title Insurance Company and four other companies.

10. There are no reasonable substitutes for access to title plant information for purposes of issuing title insurance policies in Cook County and Los Angeles County.

11. There are substantial barriers to entry into the creation of title plants in Cook County and Los Angeles County.

12. Through their respective ownership interests, Chicago Title and

Safeco are significant competitors in the production and sale of title plant information in Cook County and Los Angeles County.

V. EFFECTS OF THE ACQUISITION

13. The effects of the acquisition may be substantially to lessen competition or tend to create a monopoly in the relevant line of commerce in the following ways, among others:

a. it will eliminate substantial actual competition between Chicago Title and Safeco in the production and sale of title plant information in Cook County and Los Angeles County;

b. it will provide Chicago Title with a monopoly over title plant information in Cook County;

c. it will, by virtue of Chicago Title's ownership interest in two of the three title plants in Los Angeles County, increase the possibilities for collusion in the provision of title plant information in Los Angeles County; and

d. customers of title plant information in Cook County and Los Angeles County will be denied the benefits of free and open competition.

VI. VIOLATION CHARGED

14. The acquisition agreement described in paragraph 5 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. Section 45, and the proposed acquisition, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. Section 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. Section 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act and Clayton Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that a complaint should be issued, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Alleghany Corporation is a corporation organized, existing and doing business under and by virture of the laws of the State of Delaware, with its principal office at Park Avenue Plaza, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is hereby ordered, That as used in this order the following definitions shall apply:

A. *"Alleghany"* means Alleghany Corporation, its subsidiaries, divisions, groups and affiliates controlled by Alleghany, and their respective directors, officers, employees and representatives, and their respective successors and assigns.

B. *"Safeco"* means Safeco Corporation, its subsidiaries, divisions, groups and affiliates controlled by Safeco, and their respective directors, officers, employees and representatives, and their respective successors and assigns.

C. *"Title plant"* means a privately owned set of records regarding the ownership of and interests in real property that is maintained by obtaining information from the public records on a daily or regular basis, and is indexed, posted or otherwise organized to update data regarding specific land parcels.

D. *"TRI Plant"* means the title plant located in Los Angeles County, California, in which Alleghany maintains an ownership interest.

II.

It is further ordered, That Alleghany shall divest or shall cause to be divested, absolutely and in good faith, all of its right, title and interest in the properties described in paragraphs IIA and IIB. Divestiture shall be made within the times specified in paragraph IIA and IIB, and shall be made only to a buyer or buyers and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to ensure the continuation of the assets as ongoing, viable title plants engaged in the production and sale of title plant information, and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint in this matter.

A. Safeco's title plant in Cook County and all user or access agreements with that plant shall be divested within twelve months from the date this order becomes final. Computer and other services provided for the plant by Safeco from Safeco's other facilities, at the buyers's option at the time of purchase, will continue to be provided by Alleghany at a commercially reasonable price, for a period of up to three years from the date this order becomes final and, at the buyer's option, Alleghany will assist the buyer in transferring the computer services to any other provider of such services.

B. Either Safeco's title plant in Los Angeles County or Alleghany's interest in the TRI plant in Los Angeles County shall be divested within fourteen months from the date this order becomes final. Alternatively, Alleghany shall abandon its interest in the TRI plant within the same 14 month period. If the Safeco title plant is divested, all user or access agreements with the Safeco plant shall also be divested. If the Safeco title plant in Los Angeles County is divested, computer and other services provided for the plant by Safeco, at the buyer's option at the time of purchase will continue to be provided by Alleghany at a commercially reasonable price for a period of up to three years from the date this order becomes final and, at the buyer's option, Alleghany will assist the buyer in transferring the computer services to any other provider of such services.

III.

It is further ordered, That:

A. If Alleghany has not divested the Safeco Cook County title plant within the twelve month period, Alleghany shall consent to the appointment of a trustee by the Commission pursuant to the order. The appointment of a trustee shall not preclude the Commission from seeking civil penalties and other relief available to it for any failure by Alleghany to comply with paragraphs IIB through IX of this order.

B. If a trustee is appointed by the Commission pursuant to paragraph IIIA of the order, Alleghany shall consent to the following terms and conditions regarding the trustee's duties and responsibilities:

1. The Commission shall select the trustee, subject to Alleghany's consent, which shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall have six months from the date of appointment to submit for prior approval of the Commission the divestiture of the Safeco Cook County title plant.

3. If, at the end of the six month period, the trustee has not submitted for prior approval of the Commission a divestiture of the Safeco Cook County title plant, the trustee shall have an additional twelve month period in which to submit for prior approval of the Commission a divestiture of either the Safeco Cook County title plant or a copy of Alleghany's own computerized Cook County title plant.

4. If the trustee chooses to sell a copy of Alleghany's computerized Cook County title plant pursuant to paragraph IIIB3, the sale shall include copies of all of the computer tapes and other information used by Alleghany in its operation of the computerized title plant, with the exception of the computer hardware, updated in the future on a daily basis until such time as the buyer(s) has established a separate title plant including that information and has, in full operation, the personnel needed to continue updating the plant information without Alleghany's assistance.

5. If at the end of the trustee's twelve month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission.

6. The trustee shall have full and complete access to the personnel, books, records, and facilities relating to any undivested assets and Alleghany shall develop such financial or other information relevant to the assets to be divested as such trustee may reasonably request. Alleghany shall cooperate with the trustee and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

7. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with the order's absolute and unconditional obligation to divest and the Commission's

intention to ensure that a viable, going concern will be divested, but there shall be no minimum price.

8. The trustee shall serve at the cost and expense of Alleghany on such reasonable and customary terms and conditions as the Commissioner may set. The trustee shall account for all monies derived from asset sales and all expenses incurred. After approval by the Commission of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to Chicago Title & Trust Company and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement (percentage of price) that is contingent on the trustee causing the divestiture of the assets and that shall provide an incentive for the trustee to divest the assets as soon as possible.

9. Promptly upon appointment of the trustee, Alleghany shall, subject to the Commission's prior approval and consistent with provisions of this order, execute a trust agreement that transfers to the trustee all rights and power necessary to permit the trustee to cause divestiture of undivested assets.

10. If the trustee ceases to act or fails to act diligently, the Commission may, on its own or by request of Alleghany, appoint a substitute trustee for the balance of the time periods specified in paragraph IIIB2 and IIIB3, or any extensions thereof.

11. The trustee shall report in writing to Alleghany and the Commission every thirty days concerning the trustee's efforts to accomplish divestiture.

12. The trustee shall be authorized to retain independent legal counsel and other persons for purposes of discharging the functions set forth above. Alleghany shall reimburse the trustee for the reasonable value of all expenses so incurred.

13. If Alleghany and the trustee are unable to resolve a dispute regarding the reasonable value of his/her services or the reasonableness of an expenditure or obligation incurred by the trustee in connection with his/her efforts to divest the assets, then Alleghany and the trustee shall submit the dispute to the Commission for resolution, but the time periods shall continue to run. The trust agreement shall recite that the Commission's determination of the reasonable value of the trustee's services or the reasonableness of expenditures and other obligations incurred by the trustee shall be binding upon Alleghany and the trustee.

IV.

It is further ordered, That Alleghany shall not cause or permit the wasting or deterioration of the assets and operations to be divested in accordance with paragraphs IIA and IIB of this order in any manner that impairs the marketability of any such assets and operations or impairs in any manner the viability of the assets and operations as a going concern engaged in the production and sale of title plant information. In this regard:

A. Alleghany shall maintain the Safeco Cook County title plant and Safeco Los Angeles County title plant to the extent and in the manner maintained by Safeco prior to this acquisition, including but not limited to updating the records contained in the plants on a daily or regular basis such that the plants are as current as possible at all times.

B. Alleghany shall maintain in good faith all contracts for access to the Safeco Cook County title plant and Safeco Los Angeles County title plant subject to the terms, conditions and stipulations of those contracts, and will refrain from taking any action toward terminating those contracts other than that which would be commercially reasonable to Safeco under the terms of those agreements.

C. Alleghany shall, at the option of the accessor, automatically continue to maintain in good faith on identical terms, conditions and stipulations all contracts for access to the Safeco Cook County title plant that expire by their terms prior to divestiture of that plant for a period lasting until the closing date upon which such divestiture is completed, at which time Alleghany's obligations under such contracts shall cease, or, if divestiture of a copy of Alleghany's own plant as contemplated by paragraph IIIB3 of this order is accomplished, for a period lasting until six months after the closing date upon which such divestiture is completed, at which time Alleghany's obligations under such contracts will cease.

D. Alleghany shall, at the option of the accessor, continue to maintain in good faith on identical terms, conditions and stipulations all contracts for access to its own Cook County title plant that expire by their terms prior to divestiture of either a copy of that plant as contemplated by paragraph IIIB3 of this order or prior to divestiture of the Safeco Cook County title plant, for a period lasting until six months after the closing date upon which either divestiture is completed, at which time Alleghany's obligations under such contracts shall cease.

V.

It is further ordered, That for a period of ten years from the date this order becomes final, Alleghany shall not, directly or indirectly, acquire any stock, share capital, or equity interest in any concern, corporate or non-corporate, that in turn has any direct or indirect ownership interest in a title plant that services either Cook County, Illinois, or Los Angeles County, California, or acquire from any concern, corporate or non-corporate, any assets (other than in the ordinary course of business) of, or ownership interest in, an existing title plant that services either Cook County, Illinois or Los Angeles County, California, without the prior approval of the Federal Trade Commission.

VI.

It is further ordered, That for a period of ten years from the date this order becomes final, Alleghany shall not, directly or indirectly, acquire any stock, share capital, or equity interest in any concern, corporate or non-corporate, that in turn has any direct or indirect ownership interest in a title plant servicing any geographic area for which Alleghany at that time has any direct or indirect ownership interest in a title plant servicing the same area, or acquire from any concern, corporate or non-corporate, any assets (other than in the ordinary course of business) of, or ownership interest in, any existing title plant servicing any geographic area for which Alleghany at that time has any direct or indirect ownership interest in a title plant servicing the same area, without providing advance written notification to the Federal Trade Commission. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"). Alleghany shall provide the Notification to the Federal Trade Commission at least thirty days prior to acquiring any such interest (hereinafter referred to as the "first waiting period"). Alleghany shall provide to the Commission supplemental information either in Alleghany's possession or reasonably available to Alleghany. Such supplemental information shall include a copy of the proposed acquisition agreement; the names of the principal representatives of Alleghany and of the firm Alleghany desires to acquire who negotiated the acquisition agreement, any management or strategic plans discussing the proposed acquisition, and all documents relating to competition for the provision of title plant services in that particular county. If, within the first waiting period, representatives of the Federal Trade Commission make a written request for additional information, Alleghany shall not consummate the acquisition until twenty days after submitting such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. Section 18A).

VII.

It is further ordered, That acquisitions resulting in an ownership interest of not more than 10% of publicly traded companies, solely for the purpose of investment, are not subject to the requirements of paragraphs V and VI of this order, except that acquisitions resulting in an ownership interest of more than 5% of publicly traded companies, even if solely for the purpose of investment, are subject to the requirements of paragraphs V and VI of this order if such companies, directly or indirectly, have an ownership interest of 5% or more in Ticor Title Insurance Company, Lawyers Title Insurance Corporation, First American Title Insurance Company, Commonwealth Land Title Insurance Company, Transamerica Title Insurance Company, Stewart Title Guaranty Company, Minnesota Title Insurance Company, or TRW, Inc. or any of their successors or assigns.

VIII.

It is further ordered, That Alleghany shall notify the Commission at least thirty days prior to any change in Alleghany such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this order.

IX.

It is further ordered, That:

A. Within thirty days after the order becomes final, and every thirty days thereafter until Alleghany has fully complied with paragraph II of this order, Alleghany shall file with the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with this order. Such compliance reports shall include, in addition to any other information that the staff of the Federal Trade Commission may reasonably request, a summary of all contacts and negotiations with potential purchasers of the stock, assets, or other rights or interests to be divested under this order, the identity and address of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

B. Within one year after the order becomes final, and annually for the next nine years, Alleghany shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with this order.

Commissioners Bailey and Azcuenaga were recorded as voting in the negative.

IN THE MATTER OF

JEROME MILTON, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9187. Complaint, Sept. 24, 1984—Decision, Oct. 26, 1987

This consent order prohibits, among other things, the Chicago, Illinois maker of Shane toothpaste from representing that Shane cures or alleviates the symptoms of canker or cold sores; reduces tooth sensitivity or plaque more effectively than any other toothpaste or oral hygiene product; or cures or alleviates gum problems unless they have reliable evidence that substantiates the representation.

Appearances

For the Commission: *Nancy Warder.*

For the respondents: *Maurice Raizes, Cohon, Raizes, & Regal,* Chicago, IL.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Jerome Milton, Inc., a corporation, and Jerome Milton Schulman, individually and as an officer of Jerome Milton, Inc., hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Jerome Milton, Inc., is an Illinois corporation with its office and principal place of business located at 4350 W. Ohio Street, Chicago, Illinois.

Respondent Jerome Milton Schulman is an officer of Jerome Milton, Inc. He formulates, directs and controls the acts and practices of Jerome Milton, Inc. His address is the same as that of Jerome Milton, Inc.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are engaged in the advertising, offering for sale, sale and distribution of various dietary and health care products, including Shane toothpaste. In connection with the marketing of

Shane, respondents are now and have been engaged in the dissemination, publication, and distribution of advertisements and promotional material for the purpose of promoting the sale of Shane. As advertised, Shane is a "drug" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 3. Respondents have caused Shane to be transported from their places of business in various states to purchasers located in other states. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents have disseminated and caused the dissemination of certain advertisements and promotional materials for Shane, such as the advertising materials attached hereto as Exhibits A through F, through the United States mails and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Through the use of the advertisements and promotional materials referred to in paragraph four, and others not specifically set forth herein, respondents have represented, and now represent, directly or by implication, that:

a. the use of Shane will cure, or alleviate the symptoms of, canker sores (recurrent aphthous stomatitis), cold sores (herpes simplex type I lesions), and the gum problems associated with gingivitis and periodontitis;

b. Shane is superior to other toothpastes in reducing or eliminating plaque; and

c. the use of Shane will lessen the sensitivity of the teeth to hot and cold substances.

PAR. 6. Through the use of the advertisements and promotional materials referred to in paragraph four, respondents have represented and now represent directly or by implication that, at the time of making the representations set forth in paragraph five, they possessed and relied upon a reasonable basis for those representations.

PAR. 7. In truth and in fact, respondents, at the time of making the representations set forth in paragraph five, did not possess and rely upon a reasonable basis for those representations. Therefore, the representation set forth in paragraph six was and is unfair and deceptive.

PAR. 8. The use by respondents of the aforesaid unfair and deceptive representation has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representation was and is true and has induced, or is likely to induce, directly or indirectly, the purchase of Shane.

PAR. 9. The acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid advertisements and promotional materials, were and are all to the prejudice and injury of the public and constituted and now constitute unfair and deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission act, as amended.

ORDER

I.

It is ordered, That respondents Jerome Milton, Inc., a corporation, its successors and assigns, and its officers, and Jerome Milton Schulman, individually and as an officer of Jerome Milton, Inc., and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, labeling, packaging, offering for sale, sale, or distribution of Shane toothpaste, any other toothpaste, or any other oral hygiene product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any such product:

a. cures or alleviates the symptoms of canker sores (recurrent aphthous stomatitis), cold sores (herpes simplex type I lesions), or the gum problems associated with gingivitis and periodontitis;
b. reduces plaque more effectively than any other toothpaste or oral hygiene product;
c. reduces the sensitivity of teeth to hot and cold substances; or
d. has any other therapeutic property

unless at the time of making such representation, respondents possess and rely upon competent and reliable evidence substantiating the representation. For purposes of this order, "competent and reliable evidence" shall mean a test, analysis, research project, or study in which the evidence has been objectively obtained and evaluated by persons qualified to do so, using procedures generally accepted in the relevant profession to yield accurate results.

II.

It is further ordered, That respondents, their successors and assigns, for at least three (3) years after the date of the last dissemination of the representation, shall maintain and upon request make available to the staff of the Commission for inspection and copying copies of, and dissemination schedules for, every advertisement containing any representation(s) about oral hygiene product(s), copies of all evidence relied on for such representation(s), and copies of any document(s) in the possession or control of respondents, their successors and assigns contradicting or qualifying any such representation.

III.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IV.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment. In addition, for a period of five years from the effective date of this order, the individual respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

V.

It is further ordered, That the respondents forthwith distribute a copy of this order to each of the corporate respondent's operating divisions and to all present and future employees, agents, or representatives engaged in the preparation and placement of advertising and that the corporate respondent shall secure from each such person a signed statement acknowledging receipt of the order.

VI.

It is further ordered, That the respondents shall, within sixty (60) days after the date of service of this order, file with the Commission a report, in writing, signed by a responsible officer for respondents, setting forth in detail the manner and form in which they have complied with this order.

EXHIBIT A

Radio TV Reports
41 East 42nd Street New York N.Y. 10017
(212) 599-5500

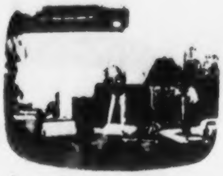
PRODUCT: SHANE TOOTHPASTE
PROGRAM: SECRET OF DR. KILDARE 6/20/1
WGN-TV (CHICAGO) 10:08AM

JEROME SCHULMAN

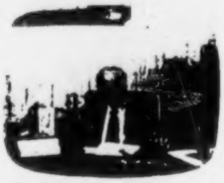
1. JEROME SCHULMAN: I'm Jerome Schulman. For years, I've had problems

JEROME SCHULMAN

2. with my gums and teeth, and sensitivity to hot and cold.



3. I've tried the major brands of toothpaste with no results.

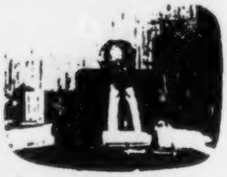


4. Since I'm a chemist, I developed a toothpaste

SHANE
SHANE
SHANE
SHANE

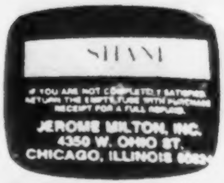
5. called Shane. Now, people across the country are using Shane with excellent results.

6. Gary Clark, Milwaukee, writes "Shane is fantastic".



7. and a letter from Chicago, "The best toothpaste I've ever used".

8. Buy Shane. If it isn't the finest toothpaste you've ever used,


SHANE
IF YOU ARE NOT COMPLETELY SATISFIED RETURN THE EMPTY TUBE WITH PURCHASE RECEIPT FOR A FULL REFUND.
JEROME MILTON, INC.
4350 W. OHIO ST.
CHICAGO, ILLINOIS

9. return the empty tube with the purchase receipt, and I will give you a full refund.

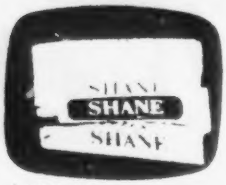
ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

While Radio TV Reports Inc. endeavors to assure the accuracy of material supplied by it, it cannot be responsible for mistakes or omissions

EXHIBIT B

Radio TV Reports
41 East 42nd Street New York N.Y. 10017
(212) 599-5500

PROGRAM STATION BREAK
WITI-TV (MILWAU



1. MAN: Why are more people switching from ordinary toothpaste to Shane? Here's Geri Rosin.

2. GERI ROSIN: In the past, I've had problems with my teeth

3. being sensitive to hot and cold, and also plaque formations, and nothing on the market seemed to work.

4. Then I heard about Shane Toothpaste.

5. I noticed how refreshing it tasted, and it had a very soothing effect on my gums and teeth.

6. Almost immediately, the sensitivity was gone, and within months,

7. the plaque formation

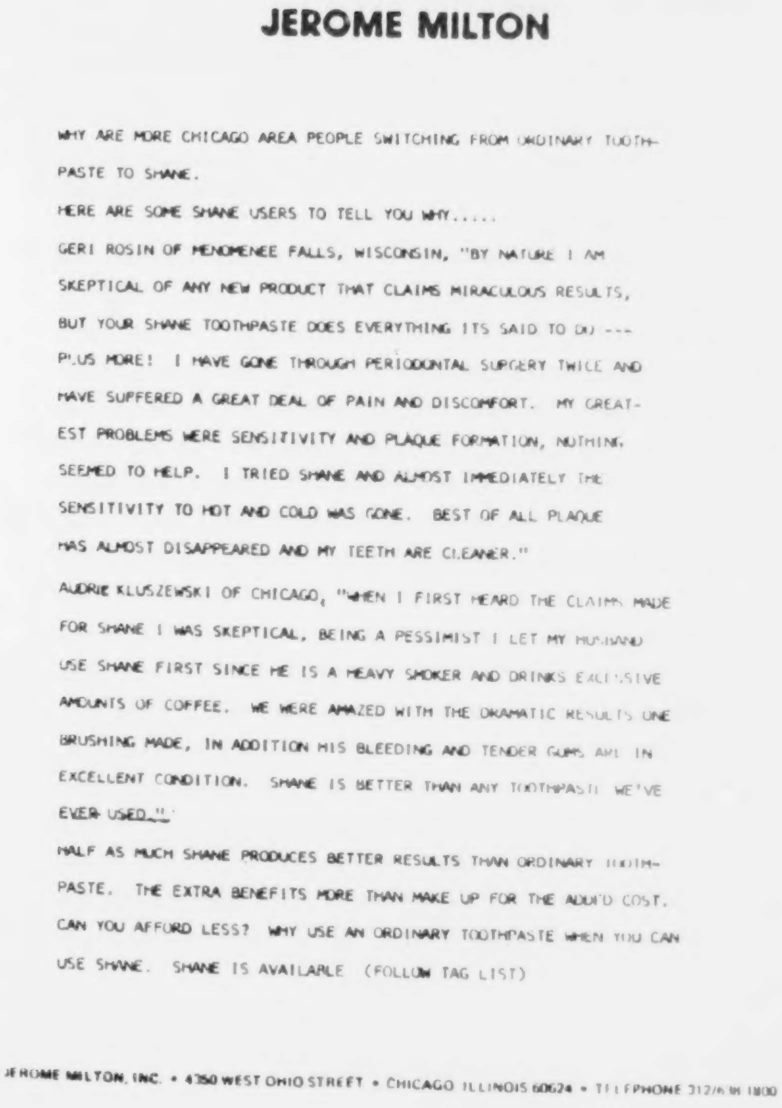
8. almost disappeared.

BUY IT AT
Walgreens

9. ANNCR: Buy it now at Walgreen's.

ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

EXHIBIT C



JEROME MILTON

WHY ARE MORE CHICAGO AREA PEOPLE SWITCHING FROM ORDINARY TOOTHPASTE TO SHANE.

HERE ARE SOME SHANE USERS TO TELL YOU WHY.....

GERI ROSIN OF MENOMENEE FALLS, WISCONSIN, "BY NATURE I AM SKEPTICAL OF ANY NEW PRODUCT THAT CLAIMS MIRACULOUS RESULTS, BUT YOUR SHANE TOOTHPASTE DOES EVERYTHING ITS SAID TO DO --- PLUS MORE! I HAVE GONE THROUGH PERIODONTAL SURGERY TWICE AND HAVE SUFFERED A GREAT DEAL OF PAIN AND DISCOMFORT. MY GREATEST PROBLEMS WERE SENSITIVITY AND PLAQUE FORMATION, NOTHING SEEMED TO HELP. I TRIED SHANE AND ALMOST IMMEDIATELY THE SENSITIVITY TO HOT AND COLD WAS GONE. BEST OF ALL PLAQUE HAS ALMOST DISAPPEARED AND MY TEETH ARE CLEANER."

AUDRIE KLUSZEWSKI OF CHICAGO, "WHEN I FIRST HEARD THE CLAIMS MADE FOR SHANE I WAS SKEPTICAL, BEING A PESSIMIST I LET MY HUSBAND USE SHANE FIRST SINCE HE IS A HEAVY SMOKER AND DRINKS EXCESSIVE AMOUNTS OF COFFEE. WE WERE AMAZED WITH THE DRAMATIC RESULTS ONE BRUSHING MADE, IN ADDITION HIS BLEEDING AND TENDER GUMS ARE IN EXCELLENT CONDITION. SHANE IS BETTER THAN ANY TOOTHPASTE WE'VE EVER USED."

HALF AS MUCH SHANE PRODUCES BETTER RESULTS THAN ORDINARY TOOTHPASTE. THE EXTRA BENEFITS MORE THAN MAKE UP FOR THE ADDED COST. CAN YOU AFFORD LESS? WHY USE AN ORDINARY TOOTHPASTE WHEN YOU CAN USE SHANE. SHANE IS AVAILABLE (FOLLOW TAG LIST)

JEROME MILTON, INC. • 4350 WEST OHIO STREET • CHICAGO ILLINOIS 60624 • TELEPHONE 312/[illegible] 1800

EXHIBIT D

:60 SPOT/LIVE

ANNOUNCER READS:

WHY ARE MORE PEOPLE SWITCHING FROM ORDINARY TOOTHPASTE TO PROFESSIONALLY FORMULATED SHANE? HERE ARE SOME SHANE USERS TO TELL YOU WHY....LOIS GRIFFIN OF ELK GROVE VILLAGE WROTE, "SHANE TOOTHPASTE IS FANTASTIC!" SHE IS ONE WHO MUST HAVE HER TEETH CLEANED EVERY THREE MONTHS AND IT WAS BOTH PAINFUL AND EXPENSIVE. SHE HAS BEEN USING SHANE AND NOW HER DENTIST TELLS HER THAT SHE CAN CUT DOWN ON THE FREQUENCY OF HER VISITS. MARY SWART OF EVERGREEN PARK WROTE THAT SHE HAS HAD CHRONIC PROBLEMS WITH CANKER SORES. SHE LEARNED ABOUT SHANE TOOTHPASTE AND WITHIN THE HOUR AFTER APPLYING SHANE, THE SORENESS WENT AWAY AND IT WAS A JOY TO EAT WITHOUT THE PAIN AND DISCOMFORT. HALF AS MUCH SHANE PRODUCES BETTER RESULTS THAN ORDINARY TOOTHPASTE. THE EXTRA BENEFITS MORE THAN MAKE UP FOR THE ADDED COST. YOU CAN'T AFFORD LESS. WHY USE AN ORDINARY TOOTHPASTE WHEN YOU CAN USE SHANE. IT'S AVAILABLE AT:

EXHIBIT E

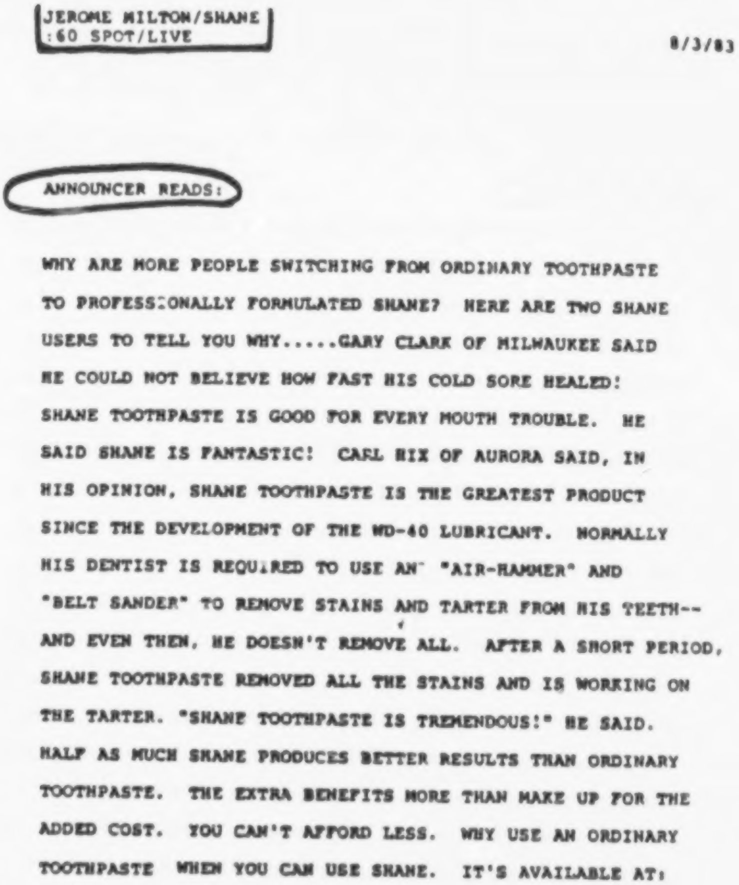
JEROME MILTON/SHANE
:60 SPOT/LIVE

8/3/83

ANNOUNCER READS:

WHY ARE MORE PEOPLE SWITCHING FROM ORDINARY TOOTHPASTE TO PROFESSIONALLY FORMULATED SHANE? HERE ARE SOME SHANE USERS TO TELL YOU WHY....PATRICIA KAWA, FROM PHOENIX, ARIZONA, WROTE SHE HAD RECENTLY VISITED HER DENTIST AND WAS TOLD THAT ALL HER BOTTOM TEETH HAD TO BE EXTRACTED. HER GUMS WERE INFECTED, HER TEETH WERE LOOSE AND SHE WAS SENSITIVE TO HOT AND COLD. SHE STARTED USING SHANE TOOTHPASTE AND THREE AND A HALF MONTHS LATER ALL HER PROBLEMS WERE GONE. SHE'S EVEN BACK TO ENJOYING CORN ON THE COB. SHANE TOOTHPASTE IS TRULY A MIRACLE-- SHE SAID IT HAS CHANGED HER LIFE. CLEO LEVINE OF CLEVELAND, OHIO SUFFERED FOR YEARS WITH PLAQUE PROBLEMS AND SENSITIVITY TO HOT AND COLD. SHE STARTED USING SHANE AND ALMOST IMMEDIATELY THE SENSITIVITY TO HOT AND COLD WAS GONE. HER PLAQUE FORMATION HAS DISAPPEARED TOO. SHE THINKS SHANE IS WONDERFUL. HALF AS MUCH SHANE PRODUCE BETTER RESULTS THAN ORDINARY TOOTHPASTE. THE EXTRA BENEFITS MORE THAN MAKE UP FOR THE ADDED COST. YOU CAN'T AFFORD LESS. WHY USE AN ORDINARY TOOTHPASTE WHEN YOU CAN USE SHANE? SHANE IS AVAILABLE AT:

EXHIBIT F



JEROME MILTON/SHANE
:60 SPOT/LIVE

8/3/83

ANNOUNCER READS:

WHY ARE MORE PEOPLE SWITCHING FROM ORDINARY TOOTHPASTE TO PROFESSIONALLY FORMULATED SHANE? HERE ARE TWO SHANE USERS TO TELL YOU WHY.....GARY CLARK OF MILWAUKEE SAID HE COULD NOT BELIEVE HOW FAST HIS COLD SORE HEALED! SHANE TOOTHPASTE IS GOOD FOR EVERY MOUTH TROUBLE. HE SAID SHANE IS FANTASTIC! CARL HIX OF AURORA SAID, IN HIS OPINION, SHANE TOOTHPASTE IS THE GREATEST PRODUCT SINCE THE DEVELOPMENT OF THE WD-40 LUBRICANT. NORMALLY HIS DENTIST IS REQUIRED TO USE AN "AIR-HAMMER" AND "BELT SANDER" TO REMOVE STAINS AND TARTER FROM HIS TEETH-- AND EVEN THEN, HE DOESN'T REMOVE ALL. AFTER A SHORT PERIOD, SHANE TOOTHPASTE REMOVED ALL THE STAINS AND IS WORKING ON THE TARTER. "SHANE TOOTHPASTE IS TREMENDOUS!" HE SAID. HALF AS MUCH SHANE PRODUCES BETTER RESULTS THAN ORDINARY TOOTHPASTE. THE EXTRA BENEFITS MORE THAN MAKE UP FOR THE ADDED COST. YOU CAN'T AFFORD LESS. WHY USE AN ORDINARY TOOTHPASTE WHEN YOU CAN USE SHANE. IT'S AVAILABLE AT:

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violations of Sections 5 and 12 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Jerome Milton, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 4350 West Ohio Street, in the City of Chicago, State of Illinois.

2. Respondent Jerome Milton Schulman is an officer of Jerome Milton, Inc. He formulates, directs, and controls the policies, acts and practices of Jerome Milton, Inc., and his address is the same as that of Jerome Milton, Inc.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondents Jerome Milton, Inc., a corporation, its successors and assigns, and its officers, and Jerome Milton Schulman, individually and as an officer of Jerome Milton, Inc., and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of Shane toothpaste, any other toothpaste, or any other oral hygiene product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any such product:

a. cures or alleviates the symptoms of canker sores (recurrent aphthous stomatitis) or cold sores (herpes simplex type I lesions);

b. reduces the sensitivity of teeth to hot and cold substances;

c. is useful in the diagnosis, cure, mitigation, treatment, or prevention of disease in man;

d. reduces plaque more effectively than any other toothpaste or oral hygiene product; or

e. cures or alleviates the gum problems associated with gingivitis or periodontitis,

unless at the time of making such representation, respondents possess and rely upon competent and reliable evidence that substantiates the representation.

For purposes of paragraphs a and b, above, "competent and reliable evidence" shall include at least one adequate and well-controlled, double-blind clinical study that conforms to accepted designs and protocols and is conducted by persons qualified by training and experience to do so;

For purposes of paragraphs d and e, above, "competent and reliable evidence" shall include at least two adequate and well-controlled, double-blind clinical studies that conform to accepted designs and protocols and are conducted by different persons, independently of each other, with such persons being qualified by training and experience to conduct such studies;

For purposes of paragraph c, above, "competent and reliable evidence" shall mean test(s), analysis(es), research project(s), or study(ies) in which the evidence has been objectively obtained and evaluated by persons qualified to do so, using procedures generally accepted in the relevant profession to yield accurate results;

Provided, however, with respect to any representation covered by this part of the order other than a claim concerning superior or comparative efficacy, if the Food and Drug Administration promulgates any standard, or any advisory review panel appointed by the Food and Drug Administration has issued a monograph, establishing that such representation is true, then in lieu of the above studies the respondents may rely on the Food and Drug Administration's standard or the panel's monograph as long as it has not been superseded and remains in effect.

II.

It is further ordered, That respondents, their successors and assigns, for at least three (3) years after the date of the last dissemination of the representation, shall maintain and upon request make available to the staff of the Commission for inspection and copying copies of, and dissemination schedules for, every advertisement containing any representation(s) about oral hygiene product(s), copies of all evidence relied on for such representation(s), and copies of any document(s) in the possession or control of respondents, their successors and assigns contradicting or qualifying any such representation.

III.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment, or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

IV.

It is further ordered, That the individual respondent named herein shall promptly notify the Commission of the discontinuance of his present business or employment and, for a period of five (5) years after the date of service of this order, shall promptly notify the Commission of each affiliation with a new business or employment, each such notice to include the individual respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of respondent's duties and responsibilities in connection with the business or employment.

V.

It is further ordered, That the respondents shall distribute a copy of this order to each of the corporate respondent's operating divisions and to all present and future employees, agents, or representatives engaged in the preparation and placement of advertising and that the corporate respondent shall secure from each such person a signed statement acknowledging receipt of the order.

VI.

It is further ordered, That the respondents shall, within sixty (60) days after the date of service of this order, file with the Commission a report in writing, signed by the individual respondent and a responsible officer for the corporate respondent, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

TARRANT COUNTY MEDICAL SOCIETY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3219. Complaint, Nov. 2, 1987—Decision, Nov. 2, 1987

This consent order requires, among other things, the Tarrant County Medical Society, of Fort Worth, Texas, to agree not to restrict, regulate or declare unethical any doctor's truthful advertising. Respondent also is required to provide, for 10 years, written notice to any doctor whose advertising it intends to challenge and allow that doctor a reasonable opportunity to respond.

Appearances

For the Commission: *Roy Conn.*

For the respondents: *William B. Davis, Cantey, Hanger, Gooch, Munn, & Collins,* Fort Worth, TX.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (Title 15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Tarrant County Medical Society is a corporation formed pursuant to the laws of the State of Texas, with its mailing address at 3855 Tulsa Way, Fort Worth, Texas.

PAR. 2. Respondent is a professional association formed to represent the interests of physicians who practice in Tarrant County, Texas. Respondent has approximately 1,300 members, constituting a substantial majority of the physicians in Tarrant County.

PAR. 3. Respondent is a component society of the Texas Medical Association, which in turn is a constituent society of the American Medical Association.

PAR. 4. Members of respondent are engaged in the business of providing medical health care services for a fee. Except to the extent that competition has been restrained as herein alleged, members of respondent have been and are now in competition among themselves and with other physicians.

PAR. 5. Respondent engages in substantial activities which further its members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 6. In the conduct of their business, members of respondent receive substantial sums of money, which flow across state lines, from the federal government and from private insurers for rendering medical services, and purchase equipment and supplies and prescribe medicines which are shipped in interstate commerce. The acts or practices described below are in interstate commerce, or affect the interstate activities of respondent's members, third-parties who pay for medical services, other third parties, and some patients of respondent's members, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 7. Respondent has acted as a combination of at least some of its members or has conspired with at least some of its members to hinder, frustrate, or restrict competition among physicians in Tarrant County by restricting or attempting to restrict its members from disseminating information to consumers through truthful, non-deceptive advertising.

PAR. 8. Respondent has engaged in various acts and practices in furtherance of this combination or conspiracy, including:

A. Through its Board of Censors, restricting or attempting to restrict the amount, duration, and size of advertising announcements that members place in newspapers. For example, respondent distributed restrictions to members that limit advertising announcements in newspapers to ten days and one-column inch in size; and

B. Through its Board of Censors, restricting or attempting to restrict the number of telephone directory listings its members place and the size of their print.

PAR. 9. The purposes or effects of the combination or conspiracy and acts or practices of respondent as described above have been and are to unreasonably restrain competition and injure consumers in one or more of the following ways, among others:

A. Vigorous competition among physicians is impeded;

B. Physicians are being deterred from advertising truthful information in the media about their prices, services, and qualifications; and

C. Consumers are being deprived of receiving truthful information about physicians' prices, services, and qualifications.

PAR. 10. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition and unfair acts or practices which violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Such combination or conspiracy is continuing and will continue absent the entry against respondent of appropriate relief.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent Tarrant County Medical Society (TCMS), and TCMS having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

TCMS, its duly authorized officer, its attorney, and counsel for the Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedures prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. TCMS is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its mailing address at 3855 Tulsa Way, Fort Worth, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

For purposes of this order, the following definitions shall apply:

A. *"TCMS"* means respondent Tarrant County Medical Society, its officers, councils, committees, boards, representatives, agents, employees, successors, and assigns; and

B. *"Adverse action"* means the revocation or suspension of, or refusal to grant, membership in TCMS, or the disciplining or penalizing of any physician.

II.

It is ordered, That TCMS, directly or indirectly, or through any device, shall forthwith cease and desist from:

Restricting, regulating, declaring unethical, impeding, interfering with, or advising against the advertising or publishing by any person or organization of information about the prices, terms, or conditions of sale of physicians' services, or of any information about physicians' services, facilities, or equipment which are offered for sale or made available by physicians or by any organization with which physicians are affiliated, including but not limited to restricting or attempting to restrict the content, format, size, or frequency of any such advertisements or publications.

Nothing contained in this order shall prohibit TCMS from formulating, adopting, disseminating to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations, including unsubstantiated representations, that TCMS reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

III.

It is further ordered, That TCMS shall cease and desist from:

A. For a period of ten (10) years after service of this order, taking any adverse action against a person alleged to have violated any rule, policy, guideline, or ethical standard relating to physician advertising without first providing such person with written notice of the allegations against such person and without providing such person a reasonable opportunity to respond. The notice required by this part shall, at a minimum, clearly specify the rule, policy, guideline, or ethical standard alleged to have been violated, the specific conduct that is alleged to have violated the rule, policy, guideline, or ethical standard, and the reasons the conduct is alleged to have violated the rule, policy, guideline, or ethical standard; and

B. Failing to maintain for five (5) years following the taking of any action referred to in this part of the order, in a separate file segregated by the name of any person against whom such action was taken, any document that embodies, discusses, mentions, refers, or relates to the action taken and any allegation relating to it.

IV.

It is further ordered, That TCMS shall:

A. For a period of five (5) years, commencing on the date this order is served, provide each applicant for membership in TCMS with a copy of this order at the time the applicant applies for membership;

B. Within sixty (60) days after service of this order, publish a copy of the complaint and this order in the *Physician,* or in any successor publication, with the same prominence as regularly published feature articles;

C. Within fifteen (15) days after service of this order, remove from TCMS' documents entitled "Board of Censors Agenda for Meeting with Provisional Members" and "Board of Censors Meeting with Applicants for Membership," and any other existing ethical or policy statement or guideline of TCMS, any provision, interpretation or statement which is inconsistent with Part II of this order, and within sixty (60) days after service of this order, publish, in the manner described in Part IV.B. of this order, a copy of the revised versions of such statements, guidelines, or interpretations to each of its members;

D. Within sixty (60) days after service of this order, send to the Southwest Bell Telephone Company supervisor in charge of professional advertising a copy of this order and accompanying complaint;

E. Within ninety (90) days after service of this order, and at any time the Commission, by written notice, may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which TCMS has complied with this order; and

F. For a period of five (5) years after service of this order, maintain and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II and III of this order, including but not limited to any advice or interpretation rendered with respect to advertising involving any physician.

V.

It is further ordered, That TCMS shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution or reorganization resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this order.

IN THE MATTER OF

NEW MEDICAL TECHNIQUES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3220. Complaint, Nov. 18, 1987—Decision, Nov. 18, 1987

This consent order prohibits, among other things, a Mystic, Connecticut manufacturer and distributor of countertop water distillers from misrepresenting that the devices are approved or endorsed by any person or organization and from making false and unsubstantiated claims concerning their ability to remove contaminants and impurities from water. Respondent is required, for three years, to maintain the material to substantiate their claims.

Appearances

For the Commission: *Joel Winston.*

For the respondents: *Richard S. Pastore, Albert, Pastore & Ward,* Greenwich, Conn.

COMPLAINT

The Federal Trade Commission, having reason to believe that New Medical Techniques, Inc., a corporation ("NMT" or "respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. NMT is a Connecticut corporation, with its offices and principal place of business in Mystic, Connecticut, and its mailing address at Post Office Box 429, Broadway Extension, Mystic, Connecticut.

PAR. 2. Respondent has advertised, offered for sale, sold and distributed water distillers and water distiller accessories, including the Aquaspring Home Water Distiller models 1.5, 4, and 5 ("Aquaspring"). These distillers are designed to remove contaminants from water through the process of boiling and recondensing the water.

PAR. 3. The acts or practices of respondent alleged in this complaint have been in or affecting commerce.

PAR. 4. Typical of respondent's advertisements and promotional materials for Aquaspring, but not necessarily all-inclusive thereof, are the promotional materials attached hereto as Exhibits A, B, C, D and E. The aforesaid advertisements and promotional materials contain the following statements:

(a) "[D]istilled water is pure water—no chemicals or bacteria. Nothing but water can be found in distilled water." (EX. A)

(b) "Only distillation will remove EVERYTHING from water." (EX. A)

(c) "The distillation process boils the source water, collects the resulting steam, cools and condenses it back into water. Bacteria and germs are immediately killed by the heat of the steam. Salts, sulphur, arsenic, mercury, chlorine and other chemical impurities do not boil at the same temperature as water. They do not, therefore, become steam, and do not travel into the cooling, condensing apparatus of the distiller. These impurities are thus left behind in the boiler with only PURE WATER delivered from the distiller's condenser unit." (EX. A)

(d) "Municipal water supplies are not safe. Recent studies have shown that chlorine, a chemical put into all public water supplies, reacts with organic matter to form chloroform. Chloroform is a known carcinogen. The United States Environmental Protection Agency recognizes the danger of chloroform in our public water supplies and soon will force the water companies to do something about it.

Unfortunately, years will pass before all chloroform is out of our water." (EX. A)

(e) "The United States Health Service, after testing our products, recommended them to their various clinics. Also, again after thorough testing, Duke Medical Center recommends our products." (EX. A)

(f) "Distilled Water—(Boiling and vaporizing) removes bacteria, minerals and chemicals.

Absolutely Pure Water." (EX. B)

(g) "Why should you take chances? You don't have to be a doctor or a well-educated person to understand that with these chemicals and pollutants in our water, it is foolish to take chances when it is so inexpensive to remove them through *distillation, NATURE'S WAY OF PURIFYING WATER.*" [emphasis in original] (EX. C)

(h) "Aquaspring 5 the new Stainless home water distiller, removes objectionable impurities from drinking water." (EX. D)

(i) "Safe * Pure * Water" (EX. D AND E)

(j) "The Aquaspring 1.5 converts tap water—even sea water—to safe pure distilled water which far exceeds drinking water standards as established by the Environmental Protection Agency." (EX. E)

(k) "Distillation is the only truly effective way to eliminate dangerous bacteria, viruses, dirt, salt, rust, chlorine and other chemicals and minerals. Other methods of water purification remove some of the contaminants, but only distillation can eliminate all impurities. At a time when our nation's water supplies are so badly polluted it makes good sense to drink distilled water." (EX. E)

PAR. 5. Through the use of the statements referred to in paragraph four (a) through (k) and others in advertisements and promotional materials not specifically set forth herein, respondent has represented, directly or by implication, that:

(a) Aquaspring will remove all impurities or contaminants from water.

(b) Aquaspring will remove all chemical impurities or contaminants from water.

(c) Aquaspring will remove chloroform from water.

(d) Consumers who use Aquaspring will be protected from all diseases or conditions caused by hazardous water-borne impurities or contaminants.

(e) Aquaspring has been tested, approved and endorsed by the Public Health Service office of the United States Department of Health and Human Services and by the Duke University Medical Center.

PAR. 6. In truth and in fact,

(a) Aquaspring will not remove all impurities or contaminants from water, because it will not remove volatile organic chemicals from water.

(b) Aquaspring will not remove all chemical impurities or contaminants from water, because it will not remove volatile organic chemicals from water.

(c) Aquaspring will not remove chloroform, a volatile organic chemical, from water.

(d) Consumers who use Aquaspring will not be protected from all diseases or conditions caused by hazardous waterborne impurities or contaminants, because Aquaspring will not remove toxic and potentially carcinogenic volatile organic chemicals from water.

(e) Aquaspring has not been tested, approved and endorsed by the Public Health Service office of the United States Department of Health and Human Services or by the Duke University Medical Center.

Therefore, the representations as set forth in paragraph five were and are false and misleading.

PAR. 7. Through the use of the statements and representations set forth in paragraphs four and five and others not specifically set forth herein, respondent has represented, directly or by implication, that, at the time it made the representations, respondent possessed and relied upon a reasonable basis for such representations.

PAR. 8. In truth and in fact, at the time respondent made said representations, respondent did not possess and rely upon a reasonable basis for such representations. Therefore, respondent's representations as set forth in paragraph seven were and are false and misleading.

PAR. 9. In the advertising and sale of Aquaspring, respondent has failed to disclose to consumers that Aquaspring does not remove from water volatile organic chemicals, which are potentially hazardous to health. This fact would be material to consumers in their decisions on whether to purchase or how to use Aquaspring. The failure to disclose this fact, in light of the representations made as alleged in paragraph five, is a deceptive practice.

PAR. 10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 (a) of the Federal Trade Commission Act.

EXHIBIT A

"YOUR INSTANT SOLUTION
TO WATER POLLUTION"©

Aquaspring® Model 1.5. Weighs only six pounds. 9½'' square at base. 110 volt.

NEW MODEL 4 FEATURES:

CUT OFF SWITCH

HEAVIER MOTOR BRACKETS

FIRE RETARDANT SHROUD

THREE-WIRE CORD

Aquaspring® Model 4:
110 volt. 60 cycles. 720 watts. Capacity: 4 gal. per day
Height: 16½; Base: 9½'' sq.; Weight: 11 pounds.

*New Aquaspring® Model #5 High Speed Stainless Steel Water Distiller - meets larger requirements. Weighs only 12 lbs., 110 Volt, 9½'' square at base.

* Available 1984

Note: New Medical Techniques' distillers come with a pyrex boiler. Stainless steel is optional.

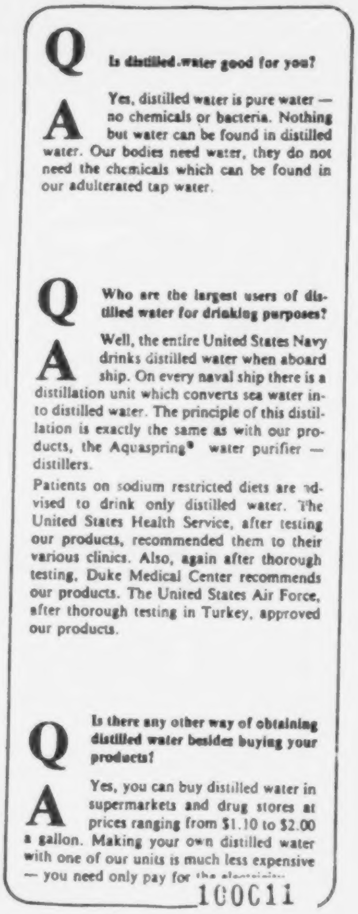
® Trademark of New Medical Techniques, Inc.
Covered by U.S. patents.
ONE YEAR WARRANTY
Copyright 1978 by New Medical Tech
Box 429, Mystic, Connecticut (

100C17

One of the
dirtiest words
in the
world . . .

WATER

100010



Q **Is distilled water good for you?**

A Yes, distilled water is pure water — no chemicals or bacteria. Nothing but water can be found in distilled water. Our bodies need water, they do not need the chemicals which can be found in our adulterated tap water.

Q **Who are the largest users of distilled water for drinking purposes?**

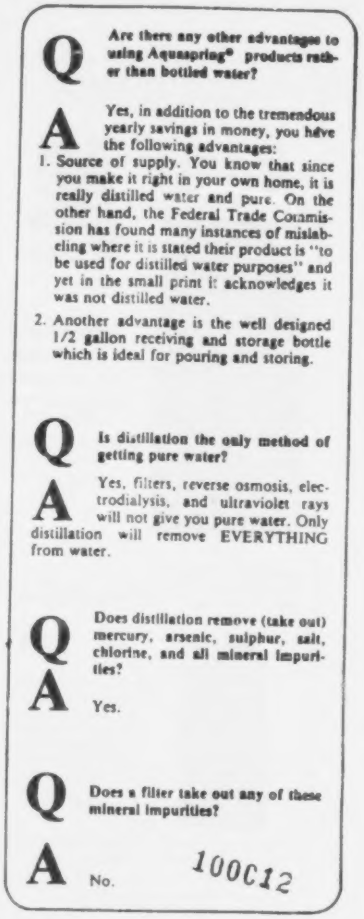
A Well, the entire United States Navy drinks distilled water when aboard ship. On every naval ship there is a distillation unit which converts sea water into distilled water. The principle of this distillation is exactly the same as with our products, the Aquaspring® water purifier — distillers.

Patients on sodium restricted diets are advised to drink only distilled water. The United States Health Service, after testing our products, recommended them to their various clinics. Also, again after thorough testing, Duke Medical Center recommends our products. The United States Air Force, after thorough testing in Turkey, approved our products.

Q **Is there any other way of obtaining distilled water besides buying your products?**

A Yes, you can buy distilled water in supermarkets and drug stores at prices ranging from $1.10 to $2.00 a gallon. Making your own distilled water with one of our units is much less expensive — you need only pay for the electricity

100C11



Q **Are there any other advantages to using Aquaspring® products rather than bottled water?**

A Yes, in addition to the tremendous yearly savings in money, you have the following advantages:

1. Source of supply. You know that since you make it right in your own home, it is really distilled water and pure. On the other hand, the Federal Trade Commission has found many instances of mislabeling where it is stated their product is "to be used for distilled water purposes" and yet in the small print it acknowledges it was not distilled water.
2. Another advantage is the well designed 1/2 gallon receiving and storage bottle which is ideal for pouring and storing.

Q **Is distillation the only method of getting pure water?**

A Yes, filters, reverse osmosis, electrodialysis, and ultraviolet rays will not give you pure water. Only distillation will remove EVERYTHING from water.

Q **Does distillation remove (take out) mercury, arsenic, sulphur, salt, chlorine, and all mineral impurities?**

A Yes.

Q **Does a filter take out any of these mineral impurities?**

A No.

100C12

Q **Is spring or mineral water pure water?**

A No. It is merely taken out of a spring, tap or well?

Q **Why is distilled water so pure?**

A The distillation process boils the source water, collects the resulting steam, cools and condenses it back into water. Bacteria and germs are immediately killed by the heat of the steam. Salts, sulphur, arsenic, mercury, chlorine and other chemical impurities do not boil at the same temperature as the water. They do not, therefore, become steam, and do not travel into the cooling, condensing apparatus of the distiller. These impurities are thus left behind in the boiler with only PURE WATER delivered from the distiller's condenser unit.

Q **Is distilled water tasteless?**

A Yes, all pure water is tasteless. Distilled water served cold, is acknowledged to be delicious.

Q **What should distilled water be used for?**

A Mainly for drinking and cooking. The supply of distilled water from an AQUASPRING® is ample for a family of 3 or 4 for drinking and cooking. The larger size unit will take care of families up to 8 to 12.

100C13

Q **A friend told me that distilled water is great to cook with. Why is that?**

A As distilled water adds no foreign substances to your food, the original tastes and flavors of your foods are preserved. If you ever wonder why someone else's food always tastes better than yours, chances are they use a better water than you do.

Q **Is distilled water the best base for mixing powdered milk, Tang, instant coffee, tea, and dehydrated soups?**

A It most certainly is. S.S. Project HOPE uses a large distillation unit, converting sea water to pure distilled water, which is then mixed with powdered milk and cooled and makes a delicious drink of which they have dispensed millions of quarts.

Q **The food did taste much better when I was young; could it be because we got our water from a well?**

A Could be, but well water can be dangerous, especially when the well is located on a small plot where it is almost impossible to keep the seepage from the cesspool or septic tank out of the well.

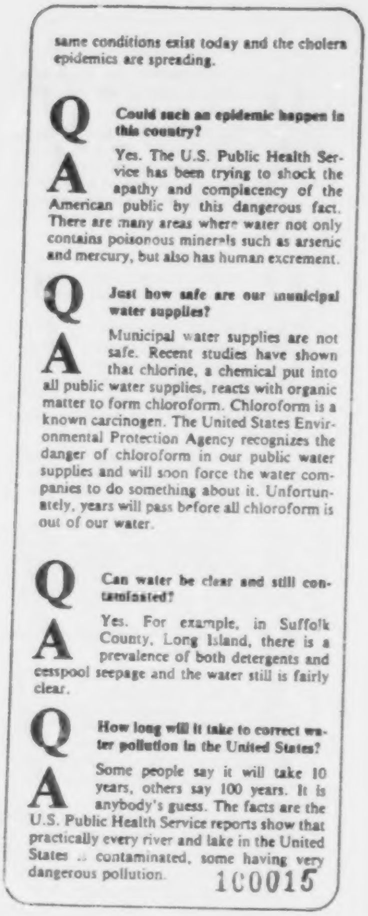
Q **What is being done about such contamination?**

A Almost nothing. A great many persons have stated that the only way we are going to start purifying the water will be in the American home. It took a long time to inform the public about distillation, what it was, how easy our products are to operate, and how economical they are.

Q **Can you get seriously ill from drinking contaminated water?**

A Yes. Many doctors have written, giving evidence that water, contaminated with human excrement, caused the cholera epidemics which were prevalent in many areas of the earth. These

100C14



same conditions exist today and the cholera epidemics are spreading.

Q **Could such an epidemic happen in this country?**

A Yes. The U.S. Public Health Service has been trying to shock the apathy and complacency of the American public by this dangerous fact. There are many areas where water not only contains poisonous minerals such as arsenic and mercury, but also has human excrement.

Q **Just how safe are our municipal water supplies?**

A Municipal water supplies are not safe. Recent studies have shown that chlorine, a chemical put into all public water supplies, reacts with organic matter to form chloroform. Chloroform is a known carcinogen. The United States Environmental Protection Agency recognizes the danger of chloroform in our public water supplies and will soon force the water companies to do something about it. Unfortunately, years will pass before all chloroform is out of our water.

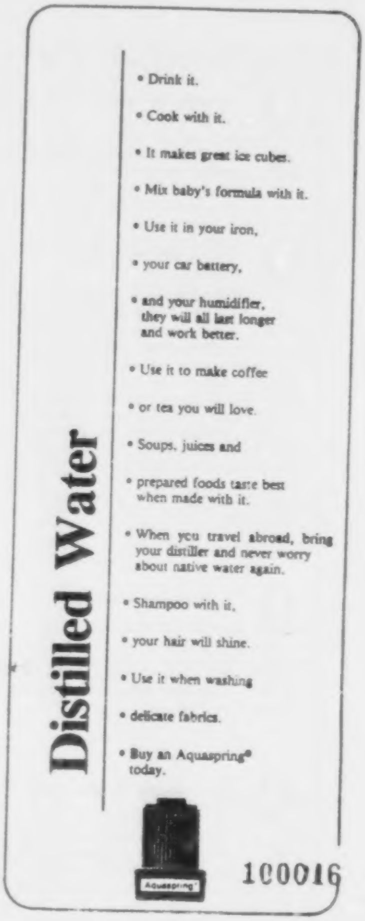
Q **Can water be clear and still contaminated?**

A Yes. For example, in Suffolk County, Long Island, there is a prevalence of both detergents and cesspool seepage and the water still is fairly clear.

Q **How long will it take to correct water pollution in the United States?**

A Some people say it will take 10 years, others say 100 years. It is anybody's guess. The facts are the U.S. Public Health Service reports show that practically every river and lake in the United States is contaminated, some having very dangerous pollution.

100015



Distilled Water

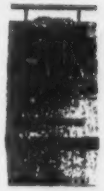
- Drink it.
- Cook with it.
- It makes great ice cubes.
- Mix baby's formula with it.
- Use it in your iron,
- your car battery,
- and your humidifier, they will all last longer and work better.
- Use it to make coffee
- or tea you will love.
- Soups, juices and
- prepared foods taste best when made with it.
- When you travel abroad, bring your distiller and never worry about native water again.
- Shampoo with it,
- your hair will shine.
- Use it when washing
- delicate fabrics.
- Buy an Aquaspring® today.

100016

EXHIBIT B

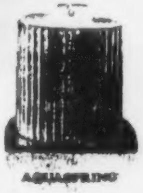
Aquaspring®

Home Water Distiller



New Aquaspring® Model #5 High Speed Stainless Steel Water Distiller - meets larger requirements. 120 Volt, 950 Watts, 9½" square at base.

Aquaspring® Model 4: Capacity: 4 gal. per day. **Weight:** 11 lbs. **Height:** 16½"; **Base:** 9½" sq.; 120 volt, 60 cycles, 720 watts.



Aquaspring® Model 1.5: **SPECIFICATIONS:** 120 volt, 60 cycles, 235 watts. Capacity: 1½ to 2 gal. per day. Height: 13½"; Base 9¼" sq. Weight: 6 pounds

ONE YEAR WARR/

DO YOU KNOW ABOUT WATER?

Boiling Water removes bacteria, but not minerals or chemicals.

Filtering Water - (charcoal, etc.) removes undissolved matter only, not bacteria, minerals or chemicals.

Distilled Water - (Boiling and vaporizing) removes bacteria, minerals and chemicals.

Absolutely Pure Water.

N.M.T. Inc.
P.O. Box 429
Mystic, Connecticut 06355

Parameter	Before	Aquaspring After Distillation
Alkalinity	6.8	Less than 2.0
Chloride	11.8	Less than 0.7
Chlorine	0.6	0.0
Copper	0.03	0.0
Fluoride	1.0	Less than 0.05
Hardness	12.5	Less than 2.0
Iron	0.11	Less than 0.04
Manganese	0.03	Not Reported
Nitrate	0.2	Less than 0.15
Nitrogen, Ammonia	0.2	Less than 0.02
Total Phosphorus	0.11	0.013
Sodium	8.8	Less than 0.4
Conductate, Specific	290.0	7.9
Sulfate	17.0	0.4

USE SCALE OFF CLEANER on a regular basis. It contains an inhibitor that protects against corrosion.

UNPLUG THE DISTILLER AFTER EACH CYCLE.

NEVER ADD WATER TO THE RESIDUE. Rinse out boiler, start with

Aquaspring®

N.M.T., INC., Mystic, CT 06355

Qty.	Item	Price
	Aquaspring — Model 1.5 with Pyrex Boiler and Two Receiving Bottles * $167.00	
	Aquaspring — Model 4 with Pyrex Boiler and Four Receiving Bottles * $275.00	
	Aquaspring — Model 5 Stainless Steel with Pyrex Boiler and 4 Receiving Bottles * $325.00	
	Pyrex Boiler for all Aquasprings ** $13.25	
	Stainless Steel Boiler for all Aquasprings ** $33.75	
	Extra pairs Receiving Bottles ** per pair $14.00	
	Carrying Case for Model 1.5 only ** $12.00	
	Scale off Cleaner Quart Container ** $18.70	
	** Prices include postage on orders in U.S.A.	
	Conn. residents only, add 7½% Sales Tax	

* Suggested Retail

____ Check or Money order enclosed

____ Ship C.O.D. Add $2.50

____ TOTAL ENCLOSED

SHIP TO:

NAME ____________

ADDRESS ____________

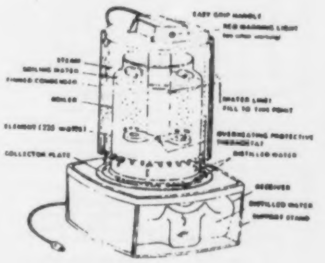
CITY ____________

ZIP CODE ____________

Prices subject to change without notice

Aquaspring®

"YOUR INSTANT SOLUTION
TO WATER POLLUTION"©


EASY GRIP HANDLE
RED WARNING LIGHT
STEAM
BOILING WATER
FINNED CONDENSER
BOILER
ELEMENT (720 watts)
COLLECTOR PLATE
WATER LINE! FILL TO THIS POINT
OVERHEATING PROTECTIVE THERMOSTAT
DISTILLED WATER
RECEIVER
DISTILLED WATER
SUPPORT STAND

100C18

Q **Is distilled water good for you?**

A Yes, distilled water is pure water — no chemicals or bacteria.

Q **Is there any other way of obtaining distilled water besides buying your products?**

A Yes, you can buy distilled water in supermarkets and drug stores at various prices.

Q **Are there any other advantages to using Aquaspring® products rather than bottled water?**

A Yes, in addition to the tremendous yearly savings in money, you have the following advantage: Source of supply. The well designed ½ gallon receiving and storage bottle which is ideal for pouring and storing.

Q **Is distillation the only method of getting pure water?**

A Yes, filters, reverse osmosis, electrodialysis, and ultraviolet rays will not give you pure water. Only Distillation will remove bacteria from water.

Q **Does distillation remove (take out) mercury, arsenic, sulphur, salt, chlorine, and all mineral impurities?**

A Yes.

100C23

MODEL 4 & 5 FEATURES

- *CUT OFF SWITCH*
- *HEAVIER MOTOR BRACKETS*
- *FIRE RETARDANT SHROUD*
- *THREE WIRE CORD*

OTHER FEATURES

- *EPA NUMBER #39852-CT-01*
- *PLASTIC FDA APPROVED*
- *ALUMINUM PARTS ANODIZED (Glass-like coating)*
- *PURIFIES WATER (Removes Bacteria and solids.)*
- *COMPACT — FITS ON COUNTER*
- *REQUIRES NO ASSEMBLY*
- *TOTALLY AUTOMATIC*
- *QUIET LONG LIFE MOTOR*
- *QUALITY CONSTRUCTION*
- *ONE YEAR WARRANTY (Parts-Labor)*
- *FAST (2½ to 3 hrs. per cycle)*

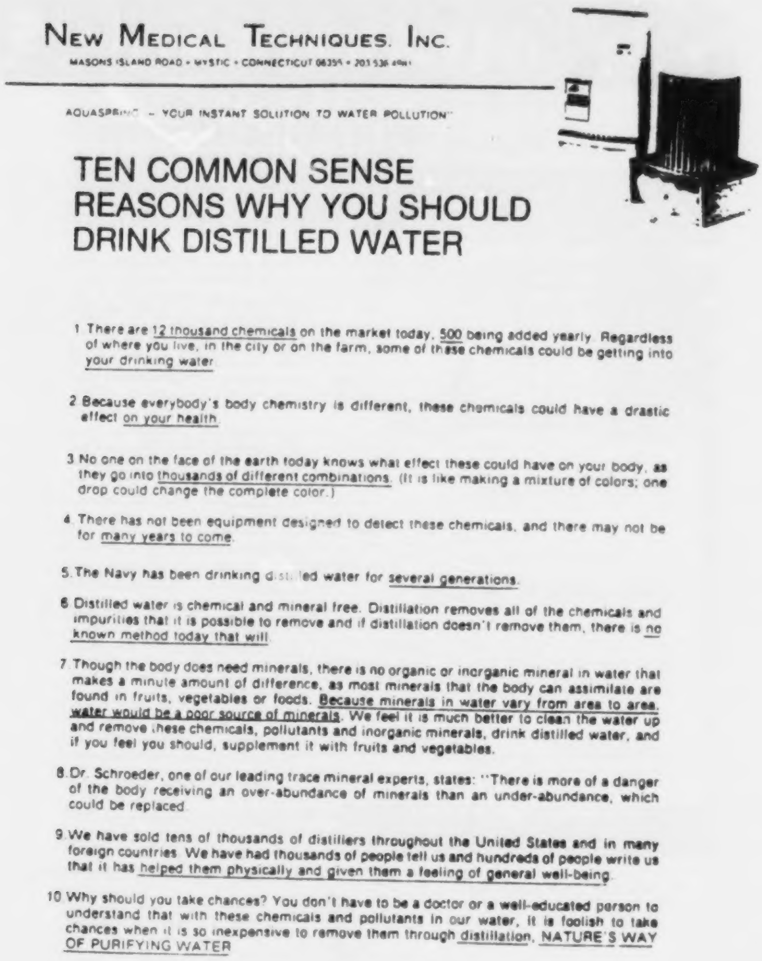
Model 5 UL Approved.

• • • • • • • • • • • • • • • • • • •

U.S. PATENTS
D-195771
D-196108
D-196147

100C22

EXHIBIT C



NEW MEDICAL TECHNIQUES, INC.

MASONS ISLAND ROAD • MYSTIC • CONNECTICUT 06355 • 203 536 49[illegible]

AQUASPRING™ – YOUR INSTANT SOLUTION TO WATER POLLUTION™

TEN COMMON SENSE REASONS WHY YOU SHOULD DRINK DISTILLED WATER

1 There are 12 thousand chemicals on the market today, 500 being added yearly. Regardless of where you live, in the city or on the farm, some of these chemicals could be getting into your drinking water.

2 Because everybody's body chemistry is different, these chemicals could have a drastic effect on your health.

3 No one on the face of the earth today knows what effect these could have on your body, as they go into thousands of different combinations. (It is like making a mixture of colors; one drop could change the complete color.)

4. There has not been equipment designed to detect these chemicals, and there may not be for many years to come.

5. The Navy has been drinking distilled water for several generations.

6 Distilled water is chemical and mineral free. Distillation removes all of the chemicals and impurities that it is possible to remove and if distillation doesn't remove them, there is no known method today that will.

7. Though the body does need minerals, there is no organic or inorganic mineral in water that makes a minute amount of difference, as most minerals that the body can assimilate are found in fruits, vegetables or foods. Because minerals in water vary from area to area, water would be a poor source of minerals. We feel it is much better to clean the water up and remove these chemicals, pollutants and inorganic minerals, drink distilled water, and if you feel you should, supplement it with fruits and vegetables.

8. Dr. Schroeder, one of our leading trace mineral experts, states: "There is more of a danger of the body receiving an over-abundance of minerals than an under-abundance, which could be replaced.

9. We have sold tens of thousands of distillers throughout the United States and in many foreign countries. We have had thousands of people tell us and hundreds of people write us that it has helped them physically and given them a feeling of general well-being.

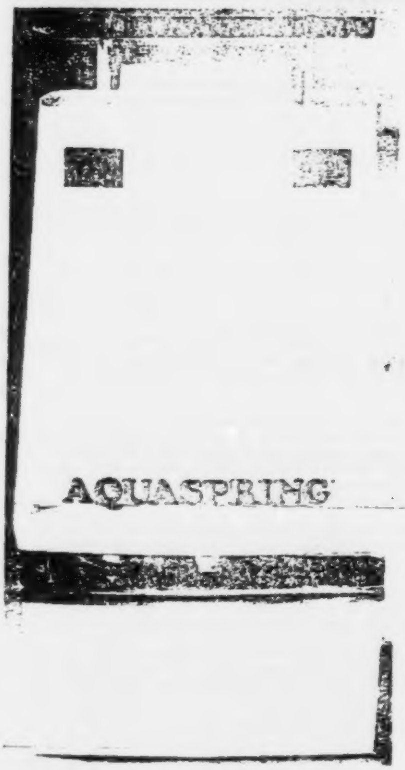
10. Why should you take chances? You don't have to be a doctor or a well-educated person to understand that with these chemicals and pollutants in our water, it is foolish to take chances when it is so inexpensive to remove them through distillation, NATURE'S WAY OF PURIFYING WATER.

EXHIBIT D

NEW AQUASPRING®-5

HI-SPEED-STAINLESS
Home Water Distiller

ENJOY CLEAN REFRESHING WATER IN YOUR OWN HOME WITHOUT BUYING EXPENSIVE BOTTLED WATER. AQUASPRING IS THE ALTERNATIVE



Safe·Pure·Water

AQUASPRING -5 the new **Stainless** home water distiller, removes objectionable impurities from drinking water. This remarkable compact appliance, manufactured by New Medical Techniques, Inc., distills tap water — or even sea water — and converts it to fresh pure drinking water — efficiently, silently, and for only pennies per gallon. Yield is 5 gallons* of distilled water a day.

AQUASPRING'S Pure Distilled Water brings out the delicious natural flavor of coffee, tea, soups, mixed drinks, juice concentrates, even ice cubes... recommended for special diet formulas and salt-free diets...eliminates drinking problems at summer cottages, fishing camps, travel trailers...excellent for color photography, electric irons, batteries.

AQUASPRING is compact and portable, weighs only 9 pounds. It plugs in like your toaster, and its action is completely automatic. No expensive plumbing hookups are needed.

AQUASPRING removes rust, dirt, salts, pesticides, chlorine, fluorides, alum, sulphur, and mineral impurities to make safe, pure distilled drinking water which meets U.S.P. standards...

It's that simple. Let **AQUASPRING -5** work while you sleep — the automatic electric circuit will turn the unit off when it produces one half gallon of water*. And an Add Water neon light goes on to let you know that you can make additional water. This neon light consumes a minute amount of energy and may serve as a nitelite in your kitchen.

Specifications:
120 volts, 60 cycle AC, 950 watts. Height-17½". Base-9½" square. Weight-9 lbs. (approx.)

WARRANTY: Guaranteed for 12 months against defects in material or workmanship.

Trademark of New Medical Techniques, Inc., Mystic, CT 06355
Covered by U.S. patents issued and pending.

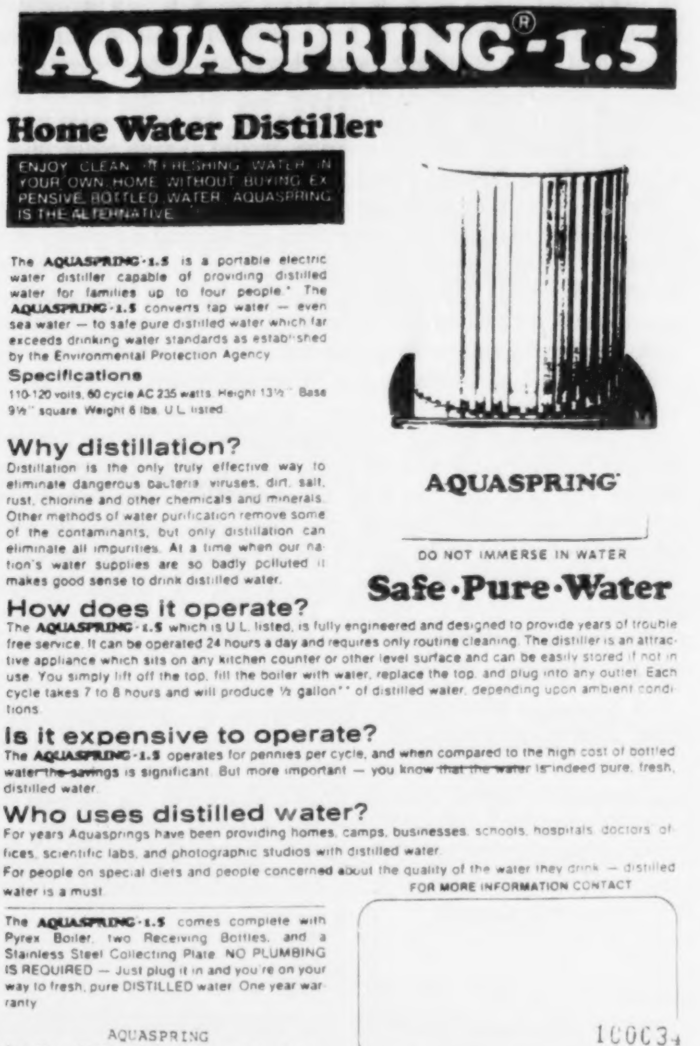
*Approx.

U.L. Approved - Listed 424D

FOR MORE INFORMATION CONTACT

100C[illegible]

EXHIBIT E



AQUASPRING®-1.5

Home Water Distiller

ENJOY CLEAN, REFRESHING WATER IN YOUR OWN HOME WITHOUT BUYING EXPENSIVE BOTTLED WATER. AQUASPRING IS THE ALTERNATIVE.

The **AQUASPRING-1.5** is a portable electric water distiller capable of providing distilled water for families up to four people.* The **AQUASPRING-1.5** converts tap water — even sea water — to safe pure distilled water which far exceeds drinking water standards as established by the Environmental Protection Agency.

Specifications

110-120 volts, 60 cycle AC 235 watts. Height 13½". Base 9½" square. Weight 6 lbs. U.L. listed.

DO NOT IMMERSE IN WATER

Safe·Pure·Water

Why distillation?

Distillation is the only truly effective way to eliminate dangerous bacteria, viruses, dirt, salt, rust, chlorine and other chemicals and minerals. Other methods of water purification remove some of the contaminants, but only distillation can eliminate all impurities. At a time when our nation's water supplies are so badly polluted it makes good sense to drink distilled water.

How does it operate?

The **AQUASPRING-1.5** which is U.L. listed, is fully engineered and designed to provide years of trouble free service. It can be operated 24 hours a day and requires only routine cleaning. The distiller is an attractive appliance which sits on any kitchen counter or other level surface and can be easily stored if not in use. You simply lift off the top, fill the boiler with water, replace the top, and plug into any outlet. Each cycle takes 7 to 8 hours and will produce ½ gallon** of distilled water, depending upon ambient conditions.

Is it expensive to operate?

The **AQUASPRING-1.5** operates for pennies per cycle, and when compared to the high cost of bottled water ~~the savings~~ is significant. But more important — you know ~~that the water~~ is indeed pure, fresh, distilled water.

Who uses distilled water?

For years Aquasprings have been providing homes, camps, businesses, schools, hospitals, doctors' offices, scientific labs, and photographic studios with distilled water.

For people on special diets and people concerned about the quality of the water they drink — distilled water is a must.

The **AQUASPRING-1.5** comes complete with Pyrex Boiler, two Receiving Bottles, and a Stainless Steel Collecting Plate. NO PLUMBING IS REQUIRED — Just plug it in and you're on your way to fresh, pure DISTILLED water. One year warranty.

FOR MORE INFORMATION CONTACT

AQUASPRING
by New Medical Techniques, Inc.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent New Medical Techniques, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its offices and principal place of business located in Mystic, Connecticut and its mailing address at Post Office Box 429, Broadway Extension, Mystic, Connecticut.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

For the purposes of this order, the following definitions shall apply:

A. *"Aquaspring"* shall mean the Aquaspring Home Water Distiller Models 1.5, 4, and 5 offered for sale, sold, or distributed by New Medical Techniques, Inc., a Connecticut corporation, under the Aquaspring trade name or any other trade name, including but not limited to "Medi-Tech" and "The Home Water Still."

B. "*Water purification device*" shall mean any product or construct which is designed to be used for the removal or reduction, by any method, of any impurities or contaminants from water intended for human consumption.

C. "*Volatile organic chemical*" shall mean any synthetic or naturally occurring organic chemical which, when present in water, generally will evaporate when the water is heated to a temperature at or less than 100 degrees Celsius.

D. "*Competent and reliable scientific test*" shall mean a test in which persons with skill and expert knowledge in the field to which the test pertains conduct the test and evaluate its results in an objective manner using testing, evaluation, and analytical procedures that ensure accurate, reliable, and reproducible results.

I.

It is ordered, That respondent New Medical Techniques, Inc., a corporation; its successors and assigns; and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Aquaspring or any other water purification device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication, that:

A. Any such device has been tested, approved, or endorsed by any person, firm, organization, or government agency;

B. Any such device will protect the user from any health hazard associated with any water-borne contaminant; and

C. Any such device (1) is capable of removing any impurity or contaminant from water, (2) will provide absolutely pure water or will remove all contaminants from water, or (3) is capable of removing all chemicals or any specific chemical from water.

II.

It is further ordered, That respondent New Medical Techniques, Inc., a corporation; its successors and assigns; and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Aquaspring or any other water purification device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

A. Any such device will protect the user from any health hazard associated with any water-borne contaminant, unless, at the time the representation is made, respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence that substantiates the representation; and

B. Any such device (1) is capable of removing any impurity or contaminant from water, (2) will provide absolutely pure water or will remove all contaminants from water, or (3) is capable of removing all chemicals or any specific chemical from water, unless, at the time the representation is made, respondent possesses and relies upon a reasonable basis consisting of a competent and reliable scientific test that substantiates the representation.

III.

It is further ordered, That respondent; its successors and assigns; and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Aquaspring or any other water purification device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, any performance or efficacy characteristic of any water purification device, unless, at the time the representation is made, respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence that substantiates the representation.

IV.

It is further ordered, That for three years from the date that the representations to which they pertain are last disseminated, respondent shall maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. All materials relied upon to substantiate any claim or representation covered by this order; and

B. All test reports, studies, surveys or other materials in its possession or control or of which it has knowledge that contradict, qualify or call into question such representation or the basis upon which respondent relied for such representation, including complaints from consumers.

V.

It is further ordered, That respondent shall include the following notice in all advertising and promotional materials for the Aquaspring or any other water purification device that does not substantially remove volatile organic chemicals from water, if that advertising or promotional material represents, directly or by implication, that the device will remove any chemical contaminant from water or will protect the user from any health hazard associated with any water-borne contaminant:

NOTICE: This device is not designed to remove potentially hazardous volatile organic chemicals from water.

Provided, however, That the above notice shall not be required where the representation is limited solely to an itemization of those contaminants that the device will substantially remove. Nothing contrary to, inconsistent with, or in mitigation of the above required language shall be used in any such advertising or promotional material. In print advertising and promotional material, the above required language shall appear in at least ten-point bold type print, in close conjunction with the representation. In any television advertising, film, videotape or slide promotional material, the above required language shall be included both orally and visually in a manner designed to ensure clarity and prominence. In radio advertising, the above required language shall be read in a clear manner.

VI.

It is further ordered, That respondent shall deliver by certified mail or in person a copy of this order to all present and future distributors of Aquaspring, and instruct said distributors in writing not to make any of the representations, directly or by implication, prohibited by this order. Delivery shall be made within thirty (30) days after the date of service of this order to all present distributors. For all future distributors, delivery shall be made prior to the time said distributors begin distribution of the product.

VII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

VIII.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon it, and at such other times as the Commission may require, file with the Commission a written report setting forth in detail the manner and form in which it has complied or intends to comply with this order.

IN THE MATTER OF

GENERAL RAILWAY SIGNAL CO., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C-837. Consent Order, Sept. 24, 1964—Modifying Order, Dec. 10, 1987

The Federal Trade Commission has modified a 1964 consent order (66 F.T.C. 882) by permitting General Railway Signal Co. to engage in any conduct or enter any agreement that is ancillary to and reasonably necessary for the formation or operation of a joint venture that is lawful under the antitrust laws.

ORDER MODIFYING CONSENT ORDER ISSUED SEPTEMBER 24, 1964

On August 12, 1987, General Railway Signal Company ("General Railway"), filed a "request to reopen proceeding and modify order" ("request"), pursuant to Section 2.51 of the Commission's Rules of Practice. The request asks the Commission to reopen the proceeding and modify the consent order issued September 24, 1964, ("the order") to permit General Railway to engage in any conduct or enter any agreement that is ancillary to and reasonably necessary for the formation or operation of a joint venture that is lawful under the antitrust laws.

The Commission has previously considered the petition of American Standard Inc. ("American Standard"), successor to respondent Westinghouse Air Brake Co. ("WABCO"), which requested, among other things, that the Commission modify the order in Docket No. C-837 to permit American Standard to engage in lawful joint venture activity. On November 13, 1986, the Commission granted that request in the public interest, finding that American Standard had made an adequate showing that currently evolving technological and economic factors in the railroad signaling equipment and systems industry have created a competitive need for American Standard to participate in joint ventures to research, develop and produce integrated railroad systems and to bid for turnkey railroad projects.

After reviewing General Railway's Request and other relevant information, the Commission has concluded that it is in the public interest to modify the order to permit General Railway to engage in conduct that is ancillary to and reasonably necessary for the formation or operation of any joint venture that is lawful under the antitrust laws. General Railway has made an adequate showing that the same industry conditions that warranted modification of the order to permit American Standard to engage in lawful joint venture activity also warrant modification of the order to extend General Railway the same relief. The currently evolving technological and economic factors in the railroad signaling equipment and systems industry cited by General Railway, and previously cited by American Standard, have created a competitive need for General Railway to also participate in joint ventures to research, develop and produce integrated railroad systems and to bid for turnkey railroad projects. The order's present language, designed to restrain conduct that might facilitate collusive agreements, could be interpreted to prohibit otherwise lawful joint venture activity. It is in the public interest to modify the order to enable General Railway to participate in otherwise lawful joint venture activity because the competitive injury that General Railway will likely suffer if it cannot engage in such lawful activity is not outweighed by any need to retain the order in its current form.[1]

Accordingly, *It is ordered*, That this matter be and it hereby is reopened and that the Commission's order issued on September 24, 1964, be and it hereby is modified to make the new subparagraph (4), which was previously added by the Commission on November 13, 1986, read as follows:

> (4) Nothing contained in the foregoing paragraphs of the order shall be construed to prohibit respondents WABCO and General Railway Signal Company from engaging in any conduct or entering into any agreement that is ancillary to and reasonably necessary for the formation or operation of a joint venture that is lawful under the antitrust laws.

---

[1] The order's provisions are aimed at horizontal conduct and agreements. The order language prohibiting agreements with "any other person, persons or business entity not a party hereto" is limited by the existing exemption for any "bona fide offer, agreement or transaction with any other person, persons or business entity to purchase or sell railroad signaling and control systems or railroad signaling equipment at prices, terms or conditions of sale independently determined and offered and independently accepted." The new modification for lawful joint venture activities will be a further limitation. The "any other person . . . not a party hereto" language will, in practical effect, mean only vendors of signaling equipment or systems.

IN THE MATTER OF

WYOMING STATE BOARD OF CHIROPRACTIC EXAMINERS

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3221. Complaint, Jan. 13, 1988—Decision, Jan. 13, 1988

This consent order requires, among other things, the Lander, Wyoming board, which has exclusive authority to license chiropractors in the state, to refrain from prohibiting, restricting, impeding or discouraging any person from advertising truthful, nondeceptive information made available by any licensed chiropractor. Respondent is prohibited from characterizing such advertising as unethical or unprofessional.

Appearances

For the Commission: *R. Norman Cramer, Jr.*

For the respondent: *Glenn R. Harrison, Wyoming State Board of Chiropractic Examiners*, Lander, WY.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, *as amended*, 15 U.S.C. Section 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Wyoming State Board of Chiropractic Examiners has violated Section 5 of the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

RESPONDENT

PARAGRAPH 1. Respondent Wyoming State Board of Chiropractic Examiners ("the Board") is organized, exists and transacts business under the laws of the State of Wyoming, with its principal office and place of business located at the office of Glenn R. Harrison, D.C., its Secretary-Treasurer, 550 Main Street, Lander, Wyoming. The Board is subject to the Commission's jurisdiction pursuant to Section 5 of the Federal Trade Commission Act.

PAR. 2. Membership on the Board is limited to practicing chiropractors. The Board is composed of three chiropractors, who are appointed by the governor to staggered three-year terms. Wyo. Stat. Sections 33–10–102, –103 (1977).

PAR. 3. All Board members must have practiced chiropractic continuously in Wyoming for at least three years preceding their appointment to the Board, and members must continue to practice chiropractic while on the Board. Wyo. Stat. Section 33–10–102 (1977). Board members spend a relatively small percentage of their time on Board matters, and compensation is limited to $10.00 per day of actual service plus a per diem and mileage allowance. Wyo. Stat. Section 33–10–114(b) (1977).

PAR. 4. The Board has exclusive authority to license chiropractors in Wyoming. It is unlawful to practice chiropractic in Wyoming without first obtaining a license from the Board. Wyo. Stat. Section 33–10–105 (1977).

PAR. 5. The Board is authorized to adopt rules and regulations necessary for the performance of its duties. Wyo. Stat. Section 33–10–104 (1977). The Board is also authorized to refuse to issue a license to, or to suspend or revoke an existing license of, any person found guilty of any of fourteen enumerated offenses. Wyo. Stat. Section 33–10–110 (a, b) (1977).

TRADE AND COMMERCE

PAR. 6. Except to the extent that competition has been restrained as alleged herein, and depending on their geographic location, chiropractors in Wyoming compete with one another, and with members of the Board.

PAR. 7. In the conduct of their businesses, chiropractors in Wyoming advertise in media having interstate circulation, receive and treat patients from other states, use supplies and equipment that are shipped across state lines, and for rendering chiropractic services, receive from the federal government and from private insurers substantial sums of money that flow across state lines. The acts and practices described below are in or affect interstate commerce within the meaning of Section 5 (a)(1) of the Federal Trade Commission Act. 15 U.S.C. Section 45 (a)(1) (1982).

STATE POLICY CONCERNING CHIROPRACTIC ADVERTISING

PAR. 8. The Board is authorized by statute to discipline chiropractors for "dishonest, unethical or unprofessional conduct likely to deceive, defraud or harm the public", and for "advertis[ing] . . . in any unethical or unprofessional manner." Wyo. Stat. Section 33–10–110 (a)(vi, xii) (1977). After these statutory provisions were enacted, the United States Supreme Court issued decisions holding broad bans on truthful, nondeceptive advertising to be contrary to the First Amendment of the United States Constitution. In 1978, the Wyoming Legislative Service Office and the Governor of Wyoming advised the Board that some of its restrictions on truthful, nondeceptive advertising were invalid and probably unenforceable. In 1983, the Wyoming Attorney General's Office also informed the Board of the constitutional problems created by its restrictions on truthful, nondeceptive advertising. The State of Wyoming has no articulated policy to restrict truthful, nondeceptive advertising by chiropractors.

BOARD CONDUCT

PAR. 9. The Board has restrained competition among chiropractors in Wyoming by combining or conspiring with its members or others, or by acting as a combination of its members or others, to restrict unreasonably the dissemination by chiropractors of truthful, nondeceptive information. In furtherance of this combination or conspiracy, the Board has engaged in the following acts or practices, among others:

(A) Adopted and maintained "Standards To Be Followed" that:

(1) characterize advertisements in telephone directories as unethical; prohibit all advertising in the telephone directory with the exception of a practitioner's name, address and —'two additional descriptive lines of information"; and ban "box ads" in telephone directories; and

(2) prohibit various forms of advertising in other media, without regard to whether such advertising is false or deceptive, by stating that "public relations" material "will deal strictly with the principles of chiropractic as a health science. The copy will never be flamboyant; will never promise cures or radical results; will never offer nor imply free consultations or examinations, nor make any statement regarding fees; will never refer to special types of technic [sic] or other methods in any manner that would imply superiority over others; will never adversely criticize other health sciences; will never make claims that cannot be substantiated by standard laboratory and diagnostic procedures";

(B) Encouraged private competing chiropractors to agree on the extent and type of advertising to permit in their area; and

(C) Directed individual chiropractors to abandon their efforts to disseminate truthful, nondeceptive information, and to stop offering free consultations or examinations.

CONSUMER AND COMPETITIVE INJURY

PAR. 10. The combination or conspiracy, and the acts and practices described above have restrained and continue to restrain truthful, nondeceptive advertising, and thereby have restrained, and have the tendency and capacity to restrain competition unreasonably, and to injure consumers, in the following ways, among others:

(A) Consumers of chiropractic services are deprived of the benefits of vigorous competition among chiropractors;

(B) Consumers are deprived of truthful, nondeceptive information about chiropractic fees and services;

(C) Chiropractors are prevented from disseminating truthful, nondeceptive information about their fees and services; and

(D) Chiropractors are unreasonably restrained from competing in or entering the market for chiropractic services.

PAR. 11. The acts and practices described above constitute unfair methods of competition and unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act. The acts and practices, or the effects thereof, are continuing and will continue in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Denver Regional Office proposed to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Wyoming State Board of Chiropractic Examiners is organized, exists and does business under and by virtue of the laws of the State of Wyoming, with its office and principal place of business

located at the office of Glenn R. Harrison, D.C., its Secretary-Treasurer, at 550 Main Street, in the City of Lander, State of Wyoming.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for the purpose of this order, the following definitions shall apply:

A. *"Board"* shall mean the Wyoming State Board of Chiropractic Examiners, its members, officers, agents, representatives, employees, successors and assigns.

B. "*Disciplinary action*" shall mean: (1) A refusal to grant, or the revocation or suspension of, a license to practice chiropractic in Wyoming; (2) a refusal to admit a person to examination for a license to practice chiropractic; (3) the issuance of a formal or informal warning, reprimand, censure, or cease and desist order against any person or organization; (4) the imposition of a fine, probation, or other penalty or condition; or (5) the initiation of an administrative, criminal, or civil court proceeding against any person or organization.

C."*Person*" shall mean any natural person, corporation, partnership, governmental entity, association, organization, or other entity.

II.

It is further ordered, That after the date of service of this order, the Board, directly or indirectly, or through any device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Prohibiting, restricting, impeding or discouraging any person from offering, publishing or advertising any price, term or condition of, or any other information concerning, any chiropractic service offered for sale or made available by any licensed chiropractor. The practices from which the Board shall cease and desist include, but are not limited to:

1. adopting or maintaining any rule, regulation, policy, or course of conduct that prohibits or seeks to prohibit advertising information about any chiropractic service;

2. taking or threatening to take any disciplinary action against any person for advertising information about any chiropractic service; or

3. declaring it to be an illegal, unethical, unprofessional, or otherwise improper or questionable practice for any person to advertise information about any chiropractic service; and

B. Inducing, urging, encouraging or assisting any nongovernmental person to take any action that if taken by the Board would be prohibited by part II(A) above.

Provided that, Nothing contained in this part shall prohibit the Board from formulating, adopting, disseminating and enforcing reasonable rules or taking disciplinary or other action, to prohibit advertising that the Board reasonably believes to be false or deceptive within the meaning of Wyo. Stat. Section 33–10–110(a)(vi), as limited by the First and Fourteenth Amendments to the United States Constitution.

Provided further that, This order shall not be construed to prevent the Board from petitioning for or seeking legislation concerning the practice of chiropractic.

III.

It is further ordered, That the Board shall:

A. Distribute by first-class mail a copy of the announcement attached hereto as Appendix A, a copy of this order and a copy of the accompanying complaint:

1. Within thirty (30) days after the date of service of this order, to each person licensed to practice chiropractic in Wyoming as of the date of service of this order and to each person whose application for, or a request for reinstatement of, a license is pending on such date; and

2. For five (5) years after the date of service of this order, to each person who applies for a license to practice chiropractic in Wyoming within (30) days after the Board receives such application;

B. Within ninety (90) days after the date of service of this order, remove from its Rules and Regulations and any other policy statement or guidelines, any provision, interpretation or statement that is inconsistent with Part II of this order;

C. For five (5) years after the date of service of this order, maintain and upon request make available to the Federal Trade Commission (or its staff), for inspection and copying, copies of all records relating to advertising, including but not limited to written communications and any summaries of oral communications to or from the Board regarding the offering, publishing or advertising of information about any chiropractic service;

D. Notify the Federal Trade Commission at least thirty (30) days in advance if possible, or otherwise as soon as possible, of any change in the Board's authority to regulate the practice of chiropractic in Wyoming that may affect compliance obligations arising out of this order, such as the complete or partial elimination of that authority, the complete or partial assumption of that authority by another governmental entity, or the dissolution of (or other relevant change in) the Board; and

E. Within one hundred twenty (120) days after the date of service of this order, submit to the Federal Trade Commission a written report setting forth in detail the manner and form in which the Board has complied and is complying with this order.

APPENDIX A

ANNOUNCEMENT

As you may be aware, the Federal Trade Commission has issued a consent order against the Wyoming State Board of Chiropractic Examiners that became final on [date]. The order provides that the Board may not prohibit chiropractors from advertising their services in a truthful, nondeceptive manner. The Board may not (1) adopt or maintain rules, regulations or policies that prohibit truthful, nondeceptive advertising with respect to the sale of chiropractic services; (2) take disciplinary action (such as the suspension, revocation or refusal to issue a license) or threaten disciplinary action against any person or organization that so advertises; or (3) declare it to be illegal, unethical, unprofessional, or otherwise improper or questionable for persons to engage in truthful, nondeceptive advertising. The Board is also prohibited from encouraging any person or organization to take actions that the order prohibits the Board from taking. The order does not affect the Board's authority to prohibit advertising that is likely to deceive or mislead the public, nor does the order prevent the Board from disciplining licensees for engaging in such advertising. Further, the order does not prevent the Board from seeking legislation concerning the practice of chiropractic.

For more specific information, you should refer to the FTC order itself. A copy of the order is enclosed.

____

(Title)
Wyoming State Board of
Chiropractic Examiners

IN THE MATTER OF

INTERCO INCORPORATED, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C-2929. Consent Order, Sept. 26, 1978—Modifying Order, Feb. 23, 1988

The Federal Trade Commission has modified a 1978 consent order (92 F.T.C. 405) with respondent and its subsidiaries by removing the ban on "preticketing", the listing of suggested retail prices on tags, with respect to the raincoats and outerwear sold by Londontown. The Commission also ordered the respondents to show cause why the provision should not be set aside in its entirety.

ORDER REOPENING AND MODIFYING ORDER ISSUED SEPTEMBER 26, 1978, AND ORDER TO SHOW CAUSE

October 26, 1987, respondents Interco Incorporated ("Interco"), Londontown Corporation ("Londontown") and Queen Casuals, Inc. ("Queen Casuals") filed a "Request As Supplemented To Reopen And Set Aside A Portion Of Order" ("request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice. Londontown is a division and Queen Casuals is a wholly owned subsidiary of Interco. The request asked the Commission to reopen the consent order issued on September 26, 1978 ("the order") and set aside a portion of paragraph 4 of Part I of the order. Respondents' request was placed on the public record for thirty days, pursuant to section 2.51 of the Commission's Rules. No comments were received.

Paragraph 4 of Part I of the order, the provision at issue here, prohibited respondents for a three year period ending October 10, 1981, from communicating in writing any resale price or sale period to any reseller or prospective reseller of its products. After October 10, 1981, respondents are permitted by the order to suggest resale prices on the pages of any list, book, advertising, promotional material or other document if they include the following statement on such material:

> "THE (RESALE PRICES OR SALE PERIODS) QUOTED HEREIN ARE SUGGESTED ONLY. YOU ARE FREE TO DETERMINE YOUR OWN (RESALE PRICE OR SALE PERIODS)."

Paragraph 4 of Part I of the order also provides:

"A respondent shall not, however, suggest resale prices on any

> tag, ticket or other marking affixed or to be affixed to any product shipped to a reseller."

It is this latter provision, which prohibits a practice known as "preticketing," that respondents request the Commission to set aside insofar as it is applicable to raincoats and outerwear sold by Londontown.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4; *Hospital Corporation of America*, Docket No. 9161, Letter to Peter J. Nickles, Esquire (November 27, 1987), at 3.

The Commission may also modify an order pursuant to section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Therefore, section 2.51 of the Commission's Rules, 16 CFR 2.51, invites respondents in petitions to reopen to show how the public interest warrants the requested modification. In the case of a request for modification based on this latter ground, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2. If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of section 5(b) plainly anticipates that the petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9–10 (1979). If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether the modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in the finality of Commission orders. See *Federated Department Stores v. Moitie,* 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

After reviewing respondents' request, the Commission has concluded that the respondents have not made a satisfactory showing that changed circumstances require that the ban on preticketing in the order should be set aside. Respondents have submitted market share and concentration data for the years 1983–1986 that tend to indicate that Londontown does not have market power in the manufacture, distribution and sale of raincoats and outerwear. However, the complaint in this matter made no allegation as to market power or market shares, and there is no reason to believe that the order or the ban on preticketing was imposed because of considerations of market share or market power. Changed factual circumstances justify modification of an order only when the changed circumstances are significant and respondent shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Albertson's Inc.,* Docket No. C–3064, (petition to reopen and set aside order granted on July 1, 1987) at 2–3; *Cooper Industries, Inc.,* Docket No. C–2970, Letter to Sean F. Boland, Esquire (September 16, 1987), at 1; *Hospital Corporation of America,* Docket No. 9161, Letter to Peter J. Nickles, Esquire (November 27, 1987), at 3. The changed circumstances alleged by respondents clearly do not meet this standard and are irrelevant to the allegations of the complaint. Accordingly, these changes do not constitute changed circumstances that require modification of the order.

The Commission has concluded, however, that it is in the public interest to reopen and set aside the ban on preticketing in the order. Respondents have shown that the ban on preticketing prohibits them from marketing their products in a manner that is available to their competitors and that would otherwise be lawful. Accordingly, the ban on preticketing places the respondents at a competitive disadvantage with respect to their competitors who are not subject to similar provisions.

The affirmative need to modify the order to eliminate the competitive disadvantage outweighs any continuing need for the prohibition on preticketing. The ban on preticketing is in the nature of a "fencing-in" provision to prevent respondents from using otherwise lawful preticketing as a device to accomplish vertical price fixing. The Commission believes that the conduct that led to the entry of this order has been interrupted for a sufficient period of time so that the ban on preticketing is no longer necessary either to dissipate the effects of respondents' past conduct or to prevent its recurrence.

Respondents have requested that the ban on preticketing be removed only with respect to raincoats and outerwear sold by Londontown. However, the Commission believes that the provision should be deleted in its entirety inasmuch as it no longer appears to be serving a remedial purpose and is inhibiting lawful competitive behavior.

Accordingly, *It is ordered,* That this matter be and it hereby is reopened and that the last sentence of paragraph 4 of Part I of the Commission's Decision and Order issued on September 26, 1978, shall be modified as of the effective date of this order to read as follows:

> A respondent shall not, however, suggest resale prices on any tag, ticket or other marking affixed or to be affixed to any product shipped to a reseller except as to raincoats and outerwear sold by Londontown.

It is further ordered, That respondents show cause why the foregoing provision should not be set aside in its entirety. In accordance with Section 3.72 of the Commission's Rules of Practice, 16 CFR 3.72, respondents have 30 days from the date of service of this order to file an answer hereto or be deemed to have accepted the action proposed herein.

Commissioner Bailey dissenting.

IN THE MATTER OF

PREFERRED PHYSICIANS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3222. Complaint, Feb. 26, 1988—Decision, Feb. 26, 1988

This consent order prohibits, among other things, an association of doctors in Tulsa, Okla., from conspiring to restrain competition and from fixing or increasing the prices they charge third-party payers for their services. In addition, the respondent is prohibited, for five years, from advising its members on the desirability or appropriateness of any price to be paid for physicians' services by any third-party payers.

Appearances

For the Commission: *Toby G. Singer.*

For the respondents: *Michael M. Eaton, Arent & Fox,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, Title 15, U.S.C. Section 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Preferred Physicians, Inc., a corporation, has violated the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Preferred Physicians, Inc. (hereinafter "respondent") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oklahoma. Respondent's principal office and place of business is located at 6161 South Yale Avenue, Tulsa, Oklahoma.

PAR. 2. Respondent's shareholders (sometimes referred to as its "members") are physicians licensed to practice in the State of Oklahoma, and are generally engaged in the business of providing medical services to patients for a fee. Except to the extent that competition has been restrained as herein alleged, respondent's members have been and are now in competition among themselves, and with other physicians and health care providers, with respect to the provision of health care services in the Tulsa, Oklahoma area.

PAR. 3. In the conduct of their business of providing medical services, respondent's members treat patients from states other than Oklahoma, use supplies and equipment that are shipped across state lines, and receive substantial sums of money that flow across state lines for rendering medical services. Fees for medical services rendered by respondent's members are paid, at times, by the federal government, by patients or third-party payers in the states other than Oklahoma, and by patients or third-party payers in the State of Oklahoma with funds collected from third-party payers in states other than Oklahoma. The general business practices of respondent's members, and the acts and practices described below, affect the interstate movement of patients, the interstate purchase of medical supplies and products, and the interstate flow of funds, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 4. Respondent's members are often paid for the services they render by third-party payers, including health maintenance organizations ("HMOs"). HMOs generally invite health care providers, including physicians, to enter into agreements to provide services to the subscribers of the third-party payers. These agreements establish the terms and conditions of the relationship between the physicians and the third-party payers, including the prices to be paid for the physicians' services. Through such agreements, HMOs may obtain discounts from physicians' usual prices, and physicians may obtain access to additional patients.

PAR. 5. Respondent has over 250 members, all of whom have hospital privileges at St. Francis Hospital in Tulsa, Oklahoma. At least 174 out of 251 physicians with active staff privileges at St. Francis Hospital are members of respondent. Because only members of the hospital's staff may admit patients to St. Francis Hospital, respondent's members, if they act in concert, can effectively control access to that hospital.

PAR. 6. St. Francis Hospital is generally regarded as the leading hospital in the Tulsa area, in terms of its size, its reputation, and the price and quality of its services. Some large employers in Tulsa are hesitant to offer any health benefits plan that does not include preferred coverage for services received at St. Francis Hospital. Therefore, any physician group that controls access to St. Francis Hospital has substantial leverage with third party payers in the Tulsa area.

PAR. 7. Third party payers compete with each other to attract subscribers for their health benefit plans on the basis of prices, services covered and many other factors important to consumers. Therefore, each third party payer seeks to minimize its costs, while also arranging for the participation of sufficient health care providers, in terms of quantity, quality and other relevant factors, to attract subscribers to its health benefits program. Accordingly, in the Tulsa area, prior to respondent's formation, third party payers offered to physicians fee schedules or other reimbursement mechanisms that the third party payers thought would minimize their costs while still attracting enough physicians in each specialty to make their health benefit programs attractive to consumers. Often, third party payers such as HMOs asked physicians to accept payments lower than the fees they usually charged, or to accept reimbursement on some basis other than fee-for-service. Physicians each decided independently whether to accept or reject any particular offer. If an offer were not accepted by a sufficient number of physicians, either in the aggregate or in particular specialties, the third-party payer either altered the terms of the proposal to make it more attractive or withdrew the offer.

PAR. 8. In or about 1984, many of the physicians in the Tulsa area who had hospital privileges at St. Francis Hospital decided and agreed not to compete with each other with respect to whether, and on what terms, to contract with third-party payers. To implement their agreement not to complete with one another, they formed respondent corporation to negotiate on their behalf with third-party payers. Their purpose was to resist competitive pressures to discount fees and to avoid accepting reimbursement on any basis other than the traditional fee-for-service method of payment for physicians' services.

PAR. 9. Respondent has acted as a combination of its members, has conspired with at least some of its members, and has acted to implement an agreement among its members, to restrain competition among physicians, by, among other things, facilitating, entering into, and implementing an agreement, express or implied:

A. That respondent would negotiate the terms and conditions of agreements between respondent's members and third-party payers, including the prices to be paid for the members' services, and that individual members would not negotiate directly with third-party payers;

B. That respondent's members would take a uniform position on the prices to be sought from third-party payers, and that the starting point for price negotiations with third-party payers would be the physician fee schedule used by the St. Francis Hospital preferred provider organization (the "Redbook").

PAR. 10. Several HMOs sought to enter into agreements with respondent's members. Some of these third-party payers attempted to negotiate the terms and conditions of the agreements, including the prices to be paid for the members' services, with individual members, but in accordance with the agreement described in Paragraphs Eight and Nine, individual members would negotiate only through respondent and would not negotiate directly with these third-party payers. Other third-party payers agreed to, and did, negotiate the terms and conditions of the agreements, including the prices to be paid for the members' services, with respondent rather than with individual members. In its negotiations with these third-party payers, respondent sought to obtain agreements that the third-party payers would adopt the Redbook fee schedule. Inherent in these negotiations was a threat that if the third-party payers did not agree to the terms and conditions acceptable to respondent, the third-party payers would be unable to obtain agreements with respondent's members.

PAR. 11. Those third-party payers that did not negotiate with respondent were unable to obtain, or were hindered in obtaining, agreements with respondent's members to provide services to the subscribers of the third-party payers. The third-party payers that were unable to obtain agreements with respondent's members were unable to provide their subscribers with the option of treatment at St. Francis Hospital, the hospital in the area with the best reputation for high quality and low cost services. Those third-party payers that negotiated with respondent and succeeded in obtaining agreements with respondent's members to provide services to the subscribers of the third-party payers were denied the benefits of competition among physicians.

PAR. 12. By engaging in the acts or practices described in paragraphs eight through eleven, respondent has acted as a combination of at least some of its members, or has combined or conspired with at least some of its members, to fix or increase the prices charged by, or otherwise to restrain competition among, physicians in the Tulsa area.

PAR. 13. Respondent has engaged in various acts and practices in furtherance of this combination or conspiracy, including, among other things:

A. Engaging in negotiations with third-party payers on behalf of its members, inherent in which were threats that if the third-party payers did not agree to terms and conditions, including prices, that were acceptable to respondent, respondent's members would refuse to enter into agreements to provide services to the subscribers of the third-party payers.

B. Recommending to its members that they enter into agreements, with third-party payers only when the agreements' terms and conditions, including prices, were acceptable to respondent.

Par. 14. Respondent's actions described in paragraphs eight through thirteen have had, or have the tendency and capacity to have, the following effects, among others:

A. Restraining competition among physicians in the area of Tulsa, Oklahoma.

B. Fixing or increasing the prices that physicians in the Tulsa area charge for their services.

C. Depriving third-party payers and their subscribers of the benefits of competition among physicians in the Tulsa area.

Par. 15. The combination or conspiracy and the acts and practices described in paragraphs eight through thirteen constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Respondent's combination or conspiracy, or the effects thereof, is continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent Preferred Physicians, Inc., and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Preferred Physicians, Inc. is a corporation organized,

existing and doing business under and by virtue of the laws of the State of Oklahoma, with its office and principal place of business located at 6161 South Yale Avenue, in the City of Tulsa, State of Oklahoma.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for purposes of this order the following definitions shall apply:

A. "*PPI*" means Preferred Physicians, Inc. and its Board of Directors, committees, officers, representatives, agents, employees, successors, and assigns.

B. "*Third-party payer*" means any person or entity that reimburses for, purchases, or pays for health care services provided to any other person, and includes, but is not limited to, health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Shield and Blue Cross plans; health maintenance organizations; preferred provider organizations; government health benefits programs; administrators of self-insured health benefits programs; and employers or other entities providing self-insured health benefits programs.

C. "*Integrated joint venture*" means a joint arrangement to provide pre-paid health care services in which physicians who would otherwise be competitors pool their capital to finance the venture, by themselves or together with others, and share substantial risk of adverse financial results caused by unexpectedly high utilization or costs of health care services.

II.

It is further ordered, That PPI, directly, indirectly, or through any corporate or other device, in connection with the provision of health care services by its members in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, shall forthwith cease and desist from:

A. Entering into, attempting to enter into, organizing, implementing, or continuing any agreement or understanding, express or implied, with any PPI member or among any PPI members, to deal with any third-party payer on collectively determined terms by, for example:

1. acting on behalf of any PPI member or members to negotiate with any third-party payer; or

2. communicating that PPI members will refuse to enter into or withdraw from any agreement, actual or proposed, with any third-party payer if any term or condition is not acceptable to PPI or to PPI members collectively.

B. For a period of five (5) years after the date the order is served, providing comments or advice to any PPI member on the desirability or appropriateness of any price to be paid for physicians' services by any third party payer, including, but not limited to, advice that any PPI member refuse to enter into or withdraw from any agreement, actual or proposed, with any third-party payer because of the price to be paid for physicians' services.

Provided that, Nothing in this order shall prevent PPI from:

(1) forming or becoming an integrated joint venture and dealing with any third-party payer on collectively determined terms in that capacity, as long as the physicians participating in the joint venture remain free to deal with any third-party payer other than through the joint venture; or

(2) upon the request of a third-party payer, performing utilization review or credentialing activities in connection with the provision of services by PPI members to subscribers of the third-party payer

III.

It is further ordered, That PPI:

A. Distribute by first-class mail a copy of this order to each of its members within thirty (30) days after the date the order is served.

B. For a period of five (5) years after the date the order is served, provide each new PPI member with a copy of this order at the time the member is accepted into membership.

IV.

It is further ordered, That PPI:

A. File a written report with the Commission within ninety (90) days after the date the order is served, and annually for three (3) years on the anniversary of the date the order was served, and at such other times as the Commission may be written notice to PPI require, setting forth in detail the manner and form in which it has complied and is complying with the order.

B. For a period of five (5) years after the date the order is served, maintain and make available to Commission staff, for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II and III of this order, including, but not limited to, all documents generated by PPI or that come into PPI's possession, custody, or control, regardless of source, that discuss, refer, or relate to any price, term, or condition of any agreement, actual or proposed, with any third-party payer.

V.

It is further ordered, That PPI shall notify the Commission at least thirty (30) days prior to any proposed change to itself, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change which may affect compliance with this order.

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

I have voted to accept the consent order in this matter. However, I would have preferred an order that included a provision for automatic termination after ten years. In my view, an antitrust conduct order should be preserved only so long as its benefits outweigh its costs. Maintaining an order such as this in perpetuity is not ordinarily appropriate. Its procompetitive remedial benefits can be expected to decline over time, and it may also begin to have adverse effects on certain procompetitive practices.

With respect to orders in merger cases, the Commission has already concluded that "order provisions requiring prior Commission approval of future acquisitions generally should not have terms exceeding ten years."[1] The Commission has determined that such provisions will in most cases have served their remedial purposes after ten years, and "the findings upon which such provisions are based should not be presumed to continue to exist for a longer period of time."[2] For similar reasons, I believe that the consent order at issue here should automatically terminate after ten years.

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[1] *Hercules, Inc.*, 100 FTC 531 (1982) (modifying order); *see also, e.g.*, *MidCon Corp.*, 107 FTC 48, 58 (1986) (consent order) (ten years); *Hospital Corp. of America*, 106 FTC 361, 524 (1985) (ten years), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, __ U.S. __, No. 86-1492 (May 3, 1987); *Columbian Enterprises, Inc.*, 106 FTC 551, 554 (1985) (consent order) (five years).

[2] *Hercules, Inc.*, 100 FTC at 531.

In the Matter of

GENERAL MOTORS CORPORATION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9074. Consent Order, June 11, 1980—Modifying Order, March 4, 1988

The Federal Trade Commission has modified a 1980 consent order (95 F.T.C. 825) with respondents by changing the accounting procedures for the sale of repossessed cars and light trucks. The Commission has replaced the repossession accounting procedure with a "repossession guide" which respondents must provide to its dealers.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On November 5, 1987, General Motors Corporation (GM) and General Motors Acceptance Corporation (GMAC) filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and Part VIII.B of the order in this matter, to reopen the proceeding and modify the order issued against GM and GMAC on June 11, 1980, in Docket No. 9074, 95 FTC 825.

This matter arose out of allegations that certain franchised General Motors dealerships and certain dealerships owned in whole or in part by GM were failing to account for and pay to defaulting customers surpluses generated by the sale of repossessed motor vehicles.[1] A complaint was issued against GM, [4] GMAC and a franchised GM dealer on February 10, 1976. Similar complaints were issued against Chrysler Corporation (D.9072), Ford Motor Company (D.9073), their respective credit subsidiaries, and a franchised dealer of each. GM and GMAC consented to the order that is the subject of this decision. Similar consent orders were issued against Chrysler and Ford and their respective credit subsidiaries.

A principal feature of each of these orders is a repossession accounting procedure that dealers of these automobile manufacturers were to use in conjunction with the disposition of repossessed motor vehicles returned to them under a recourse or repurchase agreement. The repossession accounting procedure was intended to bring about the uniform calculation of surpluses and deficiencies resulting from the resale of repossessed motor vehicles by Chrysler, Ford, and GM dealers. Each of these orders also contained a most favored corporation provision. In the GM order that provision is found at Part VIII.B. It reads as follows:

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[1] The obligation of the secured creditor or his guarantor to account for and pay surpluses arises out of Article Nine of the Uniform Commercial Code (UCC), which has been adopted by 49 states and the District of Columbia. Under the UCC, a secured party, after repossession and disposition of the collateral, is required to account to the defaulting buyer for any surplus of proceeds from the sale or disposition of the collateral in excess of the amount needed to satisfy all secured indebtedness, reasonable expenses of retaking, holding, preparing for sale, selling, and the like, and allowable legal costs and fees. *See* U.C.C. § 9–504.

> "In the event any of the proceedings presently bearing Docket Nos. 9072, 9073 or 9074 result in a final adjudicated or consent order prescribing standards less restrictive (including deferral to state law) than a corresponding provision or provisions of this order relative to (1) the disposition of repossessed vehicles, (2) the determination, calculation or communication of the existence [5] or amount of surpluses or deficiencies, or the time or manner of paying or accounting for surpluses, or (3) the determination or communication of reinstatement or redemption rights (including their duration and/or the amount necessary to reinstate or redeem), then the Commission shall, within 120 days of a General Motors respondent's request pursuant to Section 2.51 of the Commission's Rules of Practice, reopen this proceeding and order modifications of this order to such less restrictive standards proscribed in the other order(s). The enumeration of subject matter contained in clauses (1), (2) and (3) of this paragraph is exclusive."

It is implicit in the application of uniform standards such as the repossession accounting standards that GM, Ford and Chrysler have required their dealers to follow under their respective orders, that those applying such standards will bear similar added costs. A function of uniformity is to avoid creating an artificial competitive imbalance among those affected. The purpose of Part VIII.B is to avoid creating such a competitive imbalance if a similarly situated respondent is able to demonstrate the need for less restrictive standards. On April 3, 1987, we issued our decision modifying the order against Ford and Ford Credit in Docket No. 9073. We concluded, based on the materials submitted, that it was in the public interest to defer to state law with respect to the subject matter enumerated in clauses (1) and (2) of the most favored corporation provision set out above and accordingly ordered modification to that order consistent therewith.

Since there is now a final order in a related proceeding prescribing less restrictive standards with respect to enumerated [6] subject matter and GM and GMAC having petitioned to modify their order in the same manner as that granted Ford, we conclude that the modifications requested are warranted.

It is therefore ordered, That the proceeding be reopened and that the final order issued June 11, 1980, in Docket No. 9074 be, and it hereby is modified to read as follows:

I. DEFINITIONS

It is ordered, That for purposes of this order the following definitions shall apply:

A. "*General Motors respondents*" or "*respondents*" means General Motors Corporation ("General Motors") and General Motors Acceptance Corporation ("GMAC"), corporations. References to General Motors respondents shall include their successors, assignees, officers, agents, representatives and employees, as well as any corporations, subsidiaries, divisions or devices through which they act in the United States. However, references to General Motors shall not include GMAC and references to General Motors respondents shall not include dealerships. The requirements imposed on the General Motors respondent shall apply only to transactions within the United States.

B. "*Vehicle*" means an automobile or truck with a gross vehicle weight rating less than 11,000 pounds (4,990 kilograms) or a motor home. The term includes all [7] parts, accessories and appurtenances of the vehicle. A van is deemed a "truck."

C. "*Dealership*" or "*dealer*" means a corporation, partnership or proprietorship as to its operations within the United States pursuant to a Sales and Service Agreement with General Motors' Buick, Cadillac, Chevrolet, Oldsmobile, or Pontiac divisions, or the GMC Truck Division.

D. "*Retail sale*" means the sale of a vehicle by a dealer, other than for purposes of resale (e.g., sales to dealers or wholesalers), lease or rental, to a customer who is not a fleet purchaser.

E. "*Recourse financing*" means the financing of a retail sale subject to an agreement between a financing institution and a dealership (generally called a "repurchase", "recourse," or "guaranty" agreement) which provides that the dealership is obligated to pay off the outstanding obligation to the financing institution after receiving a transfer of the repossessed vehicle.

F. "*Equity dealership*" means a dealership in which General Motors holds 50 percent or more of the voting stock or is entitled to elect 50 percent or more of the board of directors.

G. "*Financing customer*" means a purchaser of a vehicle [8] from a dealership by means of a retail installment contract.

H. "*Disposition*" or "*dispose*" means a dealership's sale or lease of a repossessed vehicle previously sold by that dealership and returned to it by or for a financing institution pursuant to a recourse agreement. Such sale or lease includes only transactions with an independent third party; i.e., it does not include a sale or lease to the financing institution, the dealership or a representative of either. Disposition or dispose shall not mean the transfer of a repossessed vehicle to a dealership pursuant to a recourse agreement, or to a person or firm liable under a guaranty, endorsement, or recourse agreement covering the repossessed vehicle, nor mean a sale subsequent to a judicial sale.

I. "*Proceeds*" means whatever is received for a repossessed vehicle upon its disposition, as proceeds are described in the Initial Compliance Report. Among other things, it does not include charges for separately priced warranties and service contracts itemized in the sales contract or lease.

J. "*Allowable expenses*" means commercially reasonable expenses allowable under applicable state law. The expenses must be reasonable and directly resulting from the repossessing, holding, preparing for disposition **[9]** and disposing of the vehicle, and not otherwise reimbursed to the dealership disposing of the vehicle.

K. "*Contract balance*" means (1) the unpaid balance as of the date of repossession, less any payments made thereafter and less applicable finance charge, insurance premium and service contract rebates deducted by the financing institution, plus (2) other charges authorized by contract or law and actually assessed or incurred prior to repossession. It may reflect a deduction for insurance, service contract and warranty payments received or to be received by the financing institution.

L. "*Surplus*" means:

+ proceeds
+ applicable insurance or warranty reimbursements received by the dealership or financing institution unless these reimbursements were deducted in computing the contract balance
+ any other applicable rebates or credits not deducted in computing the contract balance
− allowable expenses
− amounts paid to discharge any **[10]** security interest in the vehicle provided for by law

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= Surplus. A negative (minus) amount produced by this calculation is referred to as a "deficiency"

M. "*Pay*" or "*paid*," in reference to payment of a surplus, means a commercially reasonable attempt to pay.

II. REPOSSESSION ACCOUNTING PROCEDURES

It is further ordered, That General Motors shall provide to all dealers within 60 days of service of this modified order, and to each new dealer within 30 days of entering into a Sales and Service Agreement, guidelines for determining the existence of surpluses and for accounting for surpluses and for any deficiencies sought.

A. These guidelines (the "repossession accounting guide") shall, by physical insertion or as a supplement, be made a part of the General Motors uniform accounting system referred to in the various dealer

Sales and Service Agreements between General Motors and its dealers. These agreements provide that this system (currently called the "General Motors Dealers Standard Accounting System Manual") should be followed in dealership operations. The repossession accounting guidelines shall also be incorporated into any [11] subsequent set or compendium of comparable instructions.

B. The repossession accounting guidelines shall include a standardized form ("dealer repossession accounting form") which dealers should use in determining for each vehicle the existence and amount of any surplus and of any deficiency sought, and in recording payment of each surplus, in accordance with the provisions of Paragraph C below.

C. The repossession accounting procedures shall provide that:

1. Each surplus should be determined and paid to the recourse financing customer within a reasonable period of time of disposition in accordance with a method conforming to Paragraphs I.H through I.L of this order;

2. Expenses other than allowable expenses should not be deducted in calculating surpluses and deficiencies sought;

3. Dispositions should be commercially reasonable. The dealer should make the same efforts to obtain the best available price for a repossessed vehicle as would be made for a comparable used vehicle, except that a dealer is not required to offer a warranty without extra charge even though such [12] warranties are provided on other used vehicles.

4. If any rebate owed to the recourse financing customer's account has not been received at the time the dealer repossession accounting form is completed, such rebate should be applied for promptly;

5. If any rebate is received after completion of the dealer repossession accounting form, any surplus or deficiencies should be redetermined and any remaining surplus paid within a reasonable time of disposition or within a reasonable time of receiving the rebate, whichever is later;

6. The dealer repossession accounting form should be prepared by the dealer for each disposition of a repossessed vehicle and:

a. should set forth the calculations of each surplus and of each deficiency sought;

b. should identify the vehicle and the financing customer and should be signed by a person authorized to sign retail installment contracts on behalf of the dealership; [13]

c. a copy of the form should be sent with the surplus payment to each recourse financing customer to whom a surplus is paid and should be sent to each recourse financing customer from whom a deficiency is sought; and

d. should be retained by the dealer, together with all relevant underlying documentations, for at least two years from the date of disposition.

7. Dealers should not obtain waivers of surplus or redemption rights from recourse financing customers, except as allowable under applicable state law.

8. Failure to account for and pay surpluses to customers may expose the dealer to legal action.

III. EQUITY DEALERSHIPS PROCEDURES

It is further ordered, That:

A. General Motors shall require each General Motors employee who is a director of an equity dealership to:

1. Provide the "repossession accounting guide" described in Part II of this order to each such dealership; and

2. Vote for resolutions so each such dealership [14] handles repossessions in accordance with applicable state law.

IV. GMAC RETAIL PLAN CHANGES, DEFICIENCY REPRESENTATIONS, POST-REPOSSESSION NOTICES

It is further ordered, That GMAC:

A. Shall, in connection with the extension and enforcement of retail credit obligations relating to the sale of vehicles by dealers, cease and desist from:

1. Purchasing a repossessed vehicle at or through any type of sale (title clearance) conducted by GMAC.

2. Misrepresenting, directly or indirectly, orally, in writing, or in any other manner, that the debtor may be liable to pay a deficiency where GMAC knows or should know that it is not entitled under state or federal law to collect a deficiency.

3. Collecting or attempting to collect a deficiency from a defaulting customer, or from his or her successors or assigns, where GMAC knows or should know that (a) it is not entitled under state or federal law to collect such deficiency, or (b) such deficiency is greater than the amount determined in accordance with the definitions set forth in Part I of this order. For purposes of this subparagraph, the [15] definitions of "proceeds" and "allowable expenses" will apply to GMAC's own dispositions.

4. Obtaining waivers of redemption or surplus rights from financing customers, except as allowable under state law.

B. Shall incorporate, by addendum or otherwise, provisions to the following effect into its Retail Plan as it relates to recourse financing, and into any subsequent edition or successor document:

1. dealers are to permit redemption by the customer whose vehicle has been repossessed, at any time until there is a binding agreement for disposition;

2. dealers are to permit redemption in accordance with the post-repossession notice sent by GMAC to the customer;

3. dealers are to determine whether a surplus exists on a recourse financing repossession according to the repossession accounting procedures described in Part II of this order;

4. in determining surpluses and deficiencies, dealers are not to deduct expenses other than allowable expenses; **[16]**

5. dealers are to account for and pay each surplus within a reasonable period of time of disposition.

C. Shall develop revised retail installment contract forms which (except as modified as described in Paragraph D below) include a clear, concise statement in lay language that, in the event of repossession:

1. no expenses other than reasonable expenses incurred as a direct result of repossessing, holding, preparing for disposition and disposing of the vehicle may be deducted from the proceeds in determining a surplus or deficiency; and

2. any surplus realized on the resale or other disposition of the vehicle is to be paid to the customer.

D. Shall distribute the revised retail installment contract forms to all dealers who use GMAC forms after the Commission issues a final rule or final adjudicated order not less restrictive than the Paragraph C statements of allowable expenses and the duty to any surpluses. If the final rule or final adjudicated order is less restrictive than the Paragraph C statements, GMAC shall complete the distribution after the Commission has modified Paragraph C to render it consistent with the final rule or final adjudicated **[17]** order. GMAC shall direct its branch offices that after the distribution to a dealership of the revised GMAC retail installment contract forms, they are not to purchase from the dealership GMAC forms of retail installment contracts that are not on the revised forms.

E. Shall establish and follow a procedure for uniformly sending a written notice ("post-repossession notice") to GMAC financing customers as soon as practicable after repossession.

1. GMAC shall periodically examine its branches' files, in accordance with its usual monitoring procedures to determine whether the

post-repossession notices have been and are being sent and shall institute appropriate actions to assure that the procedure for sending post-repossession notices is adhered to.

2. The post-repossession notice shall have a GMAC heading and shall specify in clear, lay language:

a. the name and address of the place at which the vehicle is being stored and the address and telephone number of the GMAC branch office to be contacted; **[18]**

b. the date or interval of time within which the customer may redeem by reinstating the contract in states where the creditor is required to permit reinstatement of the contract;

c. the amount necessary to redeem by reinstating the contract at the time the notice is dated, if the customer is entitled to or will be permitted to redeem by reinstatement;

d. the net amount necessary to redeem by discharging the customer's obligation at the time the notice is dated, except where the customer is entitled to or will be permitted reinstatement until the vehicle is disposed of;

e. the date or interval of time prior to which the vehicle will not be disposed of;

f. that the vehicle can be redeemed at any time prior to a binding agreement for its disposition; **[19]**

g. that additional expenses may be incurred and may increase the amount necessary to redeem the vehicle if redemption is delayed (as further described in the Initial Compliance Report);

h. that GMAC should be contacted for further information about getting the vehicle back;

i. that any surplus resulting from a sale or lease is to be paid to the customer within a reasonable time after disposition (the notice may also state that an agreement between the dealer and GMAC provides that the dealer is to pay any surplus);

j. that failure to account for and pay a surplus may give the customer a right to sue for the amount of the surplus and for any penalties provided by law

k. that the customer will be liable for a deficiency or that the deficiency cannot be collected (the **[20]** notice is to include the applicable language only);

1. that the customer should call the insurance company or the dealer to make sure that any insurance or service contract has been cancelled and that the customer has a right to credit for any refunds.

F. Shall issue no new materials to dealers inconsistent with this order.

G. In any action by the Commission seeking civil penalties for a violation of subparagraphs A.2–.4 and Paragraph E, GMAC may not be held liable if it shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. In applying this paragraph, judicial interpretations of Section 130(c) of the Truth in Lending Act, 15 U.S.C. 1640(c) (1974), shall be used.

V. EFFECT OF INCONSISTENT RULE OR ORDER

It is further ordered, That:

A. In the event the Federal Trade Commission issues a final Trade Regulation Rule establishing standards less restrictive on automobile manufacturers, financing companies or dealerships than a corresponding provision **[21]** or provisions of this order relative to (1) the disposition of repossessed vehicles, (2) the determination, calculation or communication of the existence or amount of surpluses or deficiencies, or the time or manner of paying or accounting for surpluses, or (3) the determination or communication of reinstatement or redemption rights (including their duration and/or the amount necessary to reinstate or redeem), then such less restrictive standards shall, on the effective date of the Rule, supersede and replace the corresponding provision(s) of this order. The enumeration of subject matter contained in clauses (1), (2) and (3) of this Paragraph is exclusive. However, the General Motors respondents shall advise the Commission of their intention to rely upon any provision of a Trade Regulation Rule as having superseded any provision of this order 30 days in advance of reliance thereon.

B. In the event any of the proceedings presently bearing Docket Nos. 9072, 9073 or 9074 result in a final adjudicated or consent order prescribing standards less restrictive (including deferral to state law) than a corresponding provision or provisions of this order relative to (1) the disposition of repossessed vehicles, (2) the determination, calculation or communication of the existence or amount of surpluses **[22]** or deficiencies, or the time or manner of paying or accounting for surpluses, or (3) the determination or communication of reinstatement or redemption rights (including their duration and/or the amount necessary to reinstate or redeem), then the Commission shall, within 120 days of a General Motors respondent's request pursuant to Section 3.72 of the Commission's Rules of Practice, reopen this proceeding and order modifications of this order or other relief as necessary and appropriate to conform this order to such less restrictive standards prescribed in the other order(s). The enumeration of such matter contained in clauses (1), (2) and (3) of this paragraph is exclusive.

VI. STANDARD REPORTING AND RECORDKEEPING

It is further ordered, That:

A. The General Motors respondents shall maintain complete business records relative to the manner and form of their continuing compliance with this order. These include, but are not limited to, copies of notices sent to financing customers pursuant to Part IV. The General Motors respondents shall retain all such records for at least three years and shall, upon reasonable notice, make them available for inspection and photocopying by authorized representatives of the Federal Trade Commission. [**23**]

B. Promptly following service of this order, General Motors shall distribute a copy of this order to its car divisions, GMC Truck Division, and Motors Holding Division unless previously furnished, and GMAC shall distribute a copy of this order to each of its regional managers, unless previously furnished.

C. Each of the General Motors respondents shall notify the Commission at least 30 days prior to any proposed corporate change which may negate any of the obligations of the General Motors respondents arising out of this order. Such changes include dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the discontinuance of General Motors present program for investing in equity dealerships, and the creation or dissolution of subsidiaries or any other change which may have such effect. No notice need be provided in the event of General Motors terminating, reducing or acquiring any interest in an equity dealership.

IN THE MATTER OF

ROCHESTER ANESTHESIOLOGISTS, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9199. Complaint, Sept. 30, 1985—Decision, Mar. 8, 1988

This consent order prohibits, among other things, the anesthesiologists, of Rochester, N.Y., from boycotting third-party insurance providers: by combining or taking any joint action against competing anesthesiologists; by engaging in price fixing or tampering with the reimbursement levels or terms of any third-party payor for anesthesia services; or by fixing or setting their fees.

Appearances

For the Commission: *David M. Narrow.*

For the respondents: *Kenneth A. Payment, Harter, Secrest & Emery,* Rochester, N.Y. *Harry P. Truehart, III, Nixon, Hargrave, Devans & Doyle,* Rochester, N.Y. *Robert Conklin, Hodgson, Russ, Andrews, Woods & Goodyear,* Buffalo, N.Y. and *James S. Grossman, Mousaw, Vigdor, Reeves, Heilbronner & Kroll,* Rochester, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondents have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

1. For purposes of this complaint, the following definitions shall apply:

(a) "*Blue Shield*" means Genesee Valley Medical Care, Inc., also known as Blue Shield of the Rochester Area.

(b) "*Third-party payor*" means any person or entity that engages in the process of reimbursing for, purchasing, or paying for health care services provided to any other person. Third-party payors include, but are not limited to, health insurance companies; prepaid hospital, medical or other health service plans, such as Blue Shield and Blue Cross plans; health maintenance organizations; preferred provider organizations; government health benefits programs; administrators of self-insured health benefits programs; and employers or other entities providing self-insured health benefits programs.

2. The following are the respondents' addresses:

(a) The address of respondents Jose F. Calimlim, M.D.; Frank J. Colgan, M.D.; Svend Eldrup-Jorgensen, M.D.; Jim E. Fuller, M.D.; Alastair J. Gillies, M.D.; Robert M. Lawrence, M.D.; Clara L. Linke, M.D.; Sylvia H. Marshall, M.D.; John A. Moreland, M.D.; Sriyalatha I. Nadaraja, M.D.; Seymour J. Sandler, M.D.; Pratima M. Shah, M.D.; Jaimala Thanik, M.D.; and Judit S. Wagner, M.D., is Strong Memorial Hospital, 601 Elmwood Avenue, Rochester, New York.

(b) The address of respondents Robert L. Jamison, M.D.; Stuart L. Kaplan, M.D.; Jacob Krieger, M.D.; Mehdi-Mohtashemi, M.D.; Kariappa Narayan, M.D.; David A. Sherman, M.D.; Roger Thompson, M.D.; and Tae B. Whang, M.D., is Rochester General Hospital, 1425 Portland Avenue, Rochester, New York.

(c) The address of respondents Marjanne H. Crino, M.D.; Theodore G. Ford, M.D.; Bridget A. Fraser, M.D.; Robert P. Geraci, M.D.; Manuel Gonzales, M.D.; David Hwei-Yu Hsu, M.D.; Shirley D. Hunter, M.D.; Gary C. Kent, M.D.; Paul P. Marocco, M.D.; Naseer A. Tahir, M.D.; Michael M.H. Tan, M.D.; Richard C. Templeton, M.D.; and Balkrishna Venkatesh, M.D., is the Genesee Hospital, 224 Alexander Street, Rochester, New York.

3. The respondents are medical doctors specializing in the practice of anesthesiology.

4. Respondents are engaged in the business of providing anesthesia services to patients for a fee. Fees for respondents' services are paid, at times, by patients or third-party payors in states other than New York and, at times, by patients or third-party payors in New York State with funds collected from third-party payors in states other than New York. The funds used by third-party payors to pay the fees for respondents' services are sometimes collected from employers and employees in states other than New York. Respondents' general business practices, and the acts and practices described below, affect the interstate flow of funds, the interstate purchase of medical supplies and products, and the interstate movement and billing of patients. Respondents' general business practices, and the acts and practices described below, are in or affected commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

5. Except to the extent that competition has been restrained as alleged herein, respondents have been and are now in competition

with at least some of the other respondents and with other anesthesiologists.

6. Anesthesiologists in Rochester may participate in various plans offered by certain third-party payors, including Blue Shield, by signing a participation agreement. Such agreements usually provide that the third-party payor will reimburse the participating physician directly for services provided to its subscribers, and that the participating physician will, in most situations, not charge more than an agreed-upon amount.

7. Each of the respondents have combined or conspired with at least some of the other respondents or others, in most cases since at least 1979, to restrain competition over certain terms of dealing with third-party payors and consumers, in order to increase the fees paid to them for providing anesthesia services. In furtherance thereof, respondents, among other things, have:

(a) agreed to negotiate collectively over the pricing terms on which they would participate in plans offered by third-party payors;

(b) engaged in such collective negotiations;

(c) agreed to threaten to departicipate from or not to participate in certain plans offered by third-party payors;

(d) concertedly threatened, explicitly or implicitly, to departicipate from or not to participate in certain plans offered by third-party payors;

(e) agreed to departicipate from or not to participate in certain plans offered by third-party payors; and

(f) concertedly departicipated from or refused to participate in certain plans offered by third-party payors.

8. In particular, for example, respondents jointly negotiated, through a committee of representatives, with Blue Shield during the summer and fall of 1980 in order to obtain substantially higher payments from Blue Shield. In the course of such negotiations, respondents' representatives communicated to or threatened Blue Shield that if their demand for substantially higher reimbursement was not met, respondents would departicipate from Blue Shield. Respondents subsequently departicipated concertedly from Blue Shield and increased significantly the fees they obtained for services rendered to Blue Shield subscribers. Since departicipating, none of respondents has participated in Blue Shield and no anesthesiologist at any of Rochester's three largest hospitals currently participates in Blue Shield. As a result of the departicipations, consumers in Rochester have suffered substantially increased costs for anesthesia services.

9. As an additional example, at various times since 1979 at least some respondents, through a representative or representatives, joint-

ly negotiated with Preferred Care, a health maintenance organization doing business in Rochester, in order to obtain higher payments from Preferred Care. In the course of such negotiations, those respondents communicated to or threatened Preferred Care that if their demands for higher reimbursement at the rates they specified were not met, they would refuse to participate in Preferred Care or to render services to Preferred Care subscribers. Preferred Care, in each instance, acceded to the demand for higher reimbursement at the rates specified by those respondents. As a result, Preferred Care incurred higher costs for providing anesthesia services to its subscribers and, in turn, Preferred Care subscribers incurred increased premium costs paid to Preferred Care.

10. Respondents' actions described above in paragraphs seven, eight and nine have had, or have the tendency to have, the following effects, among others:

(a) competition among anesthesiologists in the Rochester area has been lessened, limited, or restrained;

(b) fees for anesthesia services provided by some or all of respondents have been raised, fixed, or stabilized;

(c) the ability of third-party payors to compete in the Rochester area has been adversely affected; and

(d) subscribers to, policyholders of, enrollees in, or users of, plans offered by third-party payors have suffered either higher costs for anesthesia services provided by respondents, or higher premiums or costs for those plans.

11. Respondents' acts and practices, described above, constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The violations, or the effects thereof, are continuing and will continue in the absence of the relief requested.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named below with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. The following are the respondents' addresses:

(a) The address of respondents Jacob Krieger, M.D.; Mehdi-Mohtashemi, M.D.; Kariappa Narayan, M.D.; David A. Sherman, M.D.; and Tae B. Whang, M.D., is Rochester General Hospital, 1425 Portland Avenue, Rochester, New York.

(b) The address of respondent Stuart L. Kaplan, M.D., is 2966 Clover Street, Pittsford, New York.

(c) The address of respondents Marjanne H. Crino, M.D.; Theodore G. Ford, M.D.; Bridget A. Fraser, M.D.; Robert P. Geraci, M.D.; Manual Gonzalez, M.D.; David Hwei-Yu Hsu, M.D.; Shirley D. Hunter, M.D.; Gary C. Kent, M.D.; Paul P. Marocco, M.D.; Naseer A. Tahir, M.D.; Michael M.H. Tan, M.D.; Richard C. Templeton, M.D.; and Balkrishna Venkatesh, M.D., is Genesee Hospital, 224 Alexander Street, Rochester, New York.

(d) The address of respondents Jose F. Calimlim, M.D.; Frank J. Colgan, M.D.; Svend Eldrup-Jorgensen, M.D.; Jim E. Fuller, M.D.; Robert M. Lawrence, M.D.; John A. Moreland, Jr., M.D.; Sriyalatha I. Nadaraja, M.D.; Seymour J. Sandler, M.D.; Pratima M. Shah, M.D.; and Jaimala Thanik, M.D., is Strong Memorial Hospital, 601 Elmwood Avenue, Rochester, New York.

(e) The address of respondent Judit S. Wagner, M.D., is Highland Hospital, 1000 South Avenue, Rochester, New York.

(f) The address of respondent Sylvia M. Marshall, M.D., is Lakeside Memorial Hospital, Inc., 156 West Avenue, Brockport, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for purposes of this order, the following definitions shall apply:

A. *"Blue Shield"* means Genesee Valley Medical Care, Inc., also known as Blue Shield of the Rochester Area.

B. *"Third-party payor"* means any person or entity that engages in any aspect of the process of reimbursing for, purchasing, or paying for health care services provided to any other person. Third-party payors include, but are not limited to, health insurance companies; prepaid hospital, medical or other health service plans, such as Blue Shield and Blue Cross plans; health maintenance organizations; preferred provider organizations; government health benefits programs; administrators of self-insured health benefits programs; and employers or other entities providing such self-insured health benefits programs.

C. *"Blue Shield's service area"* means Monroe, Livingston, Ontario, Seneca, Wayne, and Yates counties in New York State.

D. *"Competing anesthesiologist[s]"* as to any respondent means one or more anesthesiologist[s] practicing in the same geographic area as said respondent, for example Blue Shield's service area; but an anesthesiologist is not a "competing anesthesiologist" if he or she is a member of the same single entity or group practice as said respondent, for example the anesthesiologists who are employed by the University of Rochester's Strong Memorial Hospital.

E. *"Participating physician in Blue Shield"* and *"participate in Blue Shield"* includes both direct participation in Blue Shield and indirect participation through an employing hospital.

II.

It is further ordered, That each respondent shall forthwith cease and desist from, directly or indirectly,

A. Agreeing or combining, attempting to agree or combine, or taking any action in furtherance of any agreement or combination, with any competing anesthesiologist[s] to fix, stabilize, set, or tamper with (1) the amount or any term of reimbursement or payment from, or the price or any term of purchase by, any third-party payor for any anesthesiologist's services, or (2) any pricing formula, conversion factor, or fee for any anesthesiologist's services; *Provided, however,* That this paragraph shall not prohibit any agreement, combination, or concerted action solely to provide information or views to any third-party payor concerning any issue, including reimbursement.

B. Agreeing or combining, attempting to agree or combine, or taking any action in furtherance of any agreement or combination, with any competing anesthesiologist[s] to (1) boycott, refuse to deal with, departicipate from, or not participate in, any health plan or program offered by any third-party payor, or (2) threaten to boycott, threaten to refuse to deal with, threaten to departicipate from, or threaten not to participate in, any health plan or program offered by any third-party payor, or (3) boycott or threaten to boycott any anesthesiologist on the basis of his or her participation in any health plan or program offered by any third-party payor.

III.

It is further ordered, That for a period of ten (10) years from the date this order becomes final each respondent shall forthwith cease and desist from, directly or indirectly,

A. Taking any action, individually or concertedly, to establish or implement a policy, practice, or work assignment schedule, on a rotational basis or otherwise, under which anesthesiologists are assigned to hospital patients in a manner intended to (1) limit, reduce, or suppress any anesthesiologist's incentive to participate in a third-party payor's health plan or program, or (2) prevent the accommodation of requests for an anesthesiologist who participates in a specific health plan or program offered by a third-party payor; *Provided, however,* That this paragraph shall not prohibit any respondent from taking any action, individually or concertedly, to establish or implement a policy, practice, or work assignment schedule, on a rotational basis or otherwise, that is no broader than reasonably necessary for the efficient provision of quality care, and is uniformly applied.

B. Taking any action, individually or concertedly, to deter, hinder, limit, or impede the obtaining of medical staff membership or clinical privileges by any anesthesiologist on the basis of his or her participation status in any plan or program offered by any third-party payor, or on the basis of the level of his or her fees.

IV.

It is further ordered, That for a period of five (5) years from the date this order becomes final, each respondent shall forthwith cease and desist from directly or indirectly entering into or continuing, or attempting to enter into or continue, any partnership or corporate agreement that encompasses a majority of the anesthesiologists on the active medical staff at Rochester General Hospital or a majority of the anesthesiologists on the active medical staff at Genesee Hospital, and that has or would have the purpose or the effect of eliminating or restraining competition among anesthesiologists at either of those hospitals.

V.

It is further ordered, That:

A. During any period of time within seven (7) years after the date this order becomes final that any respondent is a member of the active medical staff of any hospital in Blue Shield's service area and is not a participating physician in Blue Shield, that respondent shall disclose clearly and conspicuously to patients and prospective patients, as soon as reasonably possible after the patient or prospective patient is referred to or contacts that respondent, or is scheduled to receive anesthesia from that respondent, whichever occurs first, the following written notice:

> Notice to Blue Shield Subscribers
>
> I do not participate in Blue Shield. You will be personally liable for my entire bill, and Blue Shield will reimburse you for only a portion of my bill. Most patients who are Blue Shield subscribers will personally have to pay more out-of-pocket if they use a non-participating anesthesiologist than if they use an anesthesiologist who participates in Blue Shield. If you wish to obtain the names of anesthesiologists at this or other hospitals who do participate in Blue Shield, contact Blue Shield, your surgeon, or the hospital's department of anesthesia.
>
> ______________________
>
> [name]

Provided, however, That this notice need not be disclosed to patients who are known by the respondent not to be enrolled in or covered by any Blue Shield plan or program.

B. Paragraph V.A need not be complied with by a respondent during any portion of the seven (7) years after the date this order becomes final if, instead, during that period, the following notice is provided to patients and prospective patients who will be receiving anesthesia services at the hospital(s) in Blue Shield's service area where that respondent is a member of the active medical staff:

Notice to Blue Shield Subscribers

> Most patients who are Blue Shield subscribers will personally have to pay more out-of-pocket if they use a non-participating anesthesiologist than if they use an anesthesiologist who participates in Blue Shield. If you wish to try to arrange for an anesthesiologist who participates in Blue Shield to provide your anesthesia, please contact your surgeon or the hospital's department of anesthesiology as soon as possible. The name and current Blue Shield participation status of each anesthesiologist who normally practices at this hospital is: [followed by a list specifying the names of all anesthesiologists on the hospital's active medical staff who participate in Blue Shield, and the names of all anesthesiologists on the hospital's active medical staff who do not participate in Blue Shield].

If provided, the above notice shall be provided to the patient or prospective patient before admission to the hospital if reasonably possible; otherwise it shall be provided as soon after admission as is reasonably possible.

Provided, however, That during any period of time that no anesthesiologist on the hospital's active medical staff participates in Blue Shield, the notice contained in this paragraph V.B shall read as follows:

Notice to Blue Shield Subscribers

> The anesthesiologists who normally practice at this hospital do not participate in Blue Shield. You will be personally liable for the entire anesthesia bill, and Blue Shield will reimburse you for only a portion of the bill. Anesthesiologists who do participate have agreed to charge Blue Shield subscribers whose income does not exceed a specified level no more than a certain fee. If you wish to try to make special arrangements for treatment by an anesthesiologist who participates in Blue Shield, direct your inquiry to the hospital's anesthesia department, or your surgeon. If you wish to discuss the possibility of admission to a different hospital that has participating anesthesiologists, contact your surgeon.

VI.

It is further ordered, That:

A. Within thirty (30) days after this order becomes final, each respondent who does not participate in Blue Shield shall send the following notice to each physician who has surgical privileges at any hospital(s) in Blue Shield's service area where that respondent is a member of the active medical staff:

Notice Regarding Blue Shield Subscribers

> In helping your patients at _______ Hospital select an anesthesiologist, it may be useful for you to know that I do not participate in Blue Shield, and that I use a conversion factor of _______ in calculating my fee. Most patients who are Blue Shield subscribers will personally have to pay more out-of-pocket if they use a non-participating anesthesiologist, such as myself, than if they use an anesthesiologist who participates in Blue Shield.
>
> ________________________________
>
> [name]

B. Within thirty (30) days after this order becomes final, each respondent who does participate in Blue Shield shall send the following notice to each physician who has surgical privileges at any hospital(s) in Blue Shield's service area where that respondent is a member of the active medical staff:

Notice Regarding Blue Shield Subscribers

> In helping your patients at _______ Hospital select an anesthesiologist, it may be useful for you to know that I participate in Blue Shield. Most patients who are Blue Shield subscribers will personally have to pay more out-of-pocket if they use a non-participating anesthesiologist than if they use an anesthesiologist who participates in Blue Shield.
>
> ________________________________
>
> [name]

C. For a period of seven (7) years from the date this order becomes final, each respondent shall send, within twenty (20) days of any change in his or her participation status with respect to Blue Shield or, if respondent does not participate in Blue Shield, any change in his or her conversion factor, an appropriately revised notice to each physician who has surgical privileges at any hospital(s) in Blue Shield's service area where that respondent is a member of the active medical staff.

D. For a period of seven (7) years from the date this order becomes final, on each anniversary of the date that this order becomes final, each respondent shall send the appropriate notice to each physician who has surgical privileges at any hospital(s) in Blue Shield's service area where that respondent is a member of the active medical staff.

best copy available

E. Paragraphs VI.A, VI.B, VI.C, and VI.D need not be complied with by a respondent during any portion of the seven (7) years after the date this order becomes final if, instead, during that period, the following notice is sent to each physician with surgical privileges at the hospital(s) in Blue Shield's service area where that respondent is a member of the active medical staff:

Notice Regarding Blue Shield Subscribers

> In helping your patients at ______ Hospital select an anesthesiologist, it may be useful for you to know which anesthesiologists participate in Blue Shield. Anesthesiologists who participate in Blue Shield have agreed to charge their patients who are Blue Shield subscribers, and whose income does not exceed a specified level, no more than a certain fee. Most patients who are Blue Shield subscribers will personally have to pay more out-of-pocket if they use a non-participating anesthesiologist than if they use an anesthesiologist who participates in Blue Shield. The name and current Blue Shield participation status of each anesthesiologist who normally practices at this hospital is: [followed by a list specifying the names of all anesthesiologists on the hospital's active medical staff who participate in Blue Shield, and the names of all anesthesiologists on the hospital's active medical staff who do not participate in Blue Shield].

If sent, the above notice shall be sent within thirty (30) days after the date this order becomes final. Thereafter, for a period of seven (7) years, the notice, with any revisions, shall be sent on each anniversary of the date that this order becomes final, and within sixty (60) days of any change in the participation status of any anesthesiologist who is a member of the active medical staff.

VII.

It is further ordered, That each respondent shall provide any patient, prospective patient, or physician who requests information from that respondent or respondent's agent regarding respondent's fees, prices, or participation status in any third-party payor's plan or program, with the requested information, including, when requested, respondent's fee or price, or the best estimate thereof, and an explanation of how respondent's fee or price will be determined, including the exact conversion factor that will be used, if one will be used.

VIII.

It is further ordered, That this order shall not prohibit any respondent from:

A. Participating in professional peer review of fees charged by individual physicians in individual cases; or

B. Exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body concerning legislation, rules or procedures, or to participate in any federal or state administrative or judicial proceeding.

IX.

It is further ordered, That:

A. Within thirty (30) days after this order becomes final, respondent Robert P. Geraci shall provide a copy of this order and complaint to each anesthesiologist who is a member of the Genesee Hospital Department of Anesthesia and who is not a respondent in this matter, that respondent Jacob Krieger shall provide a copy of this order and complaint to each anesthesiologist who is a member of the Rochester General Hospital Department of Anesthesia and who is not a respondent in this matter, and that respondent Robert M. Lawrence shall provide a copy of this order and complaint to each anesthesiologist who is a member of the Strong Memorial Hospital Department of Anesthesia and who is not a respondent in the matter.

B. Sixty (60) days after this order becomes final, and at such other times as the Commission may by written notice require, each respondent shall submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which he or she is complying, or has complied, with this order.

C. For a period of seven (7) years from the date this order becomes final, each respondent shall notify the Federal Trade Commission at least thirty (30) days prior to any change in his or her practice that may affect compliance with the obligations arising from this order.

Commissioners Bailey and Azcuenaga were recorded as voting in the negative.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I have voted not to accept the consent agreement in *Rochester Anesthesiologists*, Docket No. 9199, because it fails to contain a jurisdictional admission for some respondents. As required by Rule 2.32, Paragraph 3 of the Agreement Containing Consent Order To Cease and Desist recites that "Respondents admit all of the jurisdictional facts set forth in the Commission's complaint in this proceeding." Paragraph 4, also in compliance with Rule 2.32, recites in part that the respondents waive "[a]ll rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement." Paragraph 3 of the agreement also states, however, that for purposes of any enforcement action, "respondents employed by the University of Rochester note their denial that the commission has jurisdiction over them in their capacity as employees of the University of Rochester." Most, if not all, of the respondents now employed by the University of Rochester were also so employed at the time of the alleged violation. With this language, the agreement is inconsistent on its face, and it does not settle the jurisdictional question, as Rule 2.32 plainly anticipates it should.

Although there may be a difference between admitting jurisdictional facts and admitting that those facts confer jurisdiction, Rule 2.32 plainly requires that a respondent entering into a consent agreement admit both. The purpose of a consent agreement is to settle the case, to resolve the issues that the parties would have litigated. The policy underlying Rule 2.32, which is unequivocal in requiring jurisdictional admissions in every case, is the necessity that the Commission assert jurisdiction only when it has jurisdiction. Any departure from the standard jurisdictional admission invites speculation as to the scope of the limitation and creates uncertainty about the Commission's authority to issue and enforce the order.

If jurisdiction is in question, the Commission should decide the issue now. If the Commission is uncertain of its jurisdiction, it should not impose an order by consent with a respondent any more than it would do so following litigation. If we are sure of our jurisdiction, as in this case, then we should not accept a qualified jurisdictional admission. It is the responsibility of the Commission, not the courts, to determine its jurisdiction in the first instance. *See FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972); *American General Insurance Co. v. FTC*, 496 F.2d 197 (5th Cir. 1974). When we waver in asserting jurisdiction but still impose a law enforcement remedy, we abdicate our most fundamental responsibility.

I dissent.

IN THE MATTER OF

GREAT EARTH INTERNATIONAL, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3223, Complaint, Mar. 15, 1988—Decision, Mar. 15, 1988

This consent order prohibits, among other things, a Santa Ana, Calif.-based food supplements franchisor from making certain claims about the supplements' effectiveness. Respondent is also prohibited from using the name "Growth Hormone Releaser," "GHR," or any similar name unless it has substantiation that the product stimulates the body or pituitary gland to release significantly greater amounts of human growth hormone in users than in non-users.

Appearances

For the Commission: *Janice Frankle.*

For the respondent: *Michael Hart, Hart & Hart,* Los Angeles, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Great Earth International, Inc., a corporation, hereinafter referred to as respondent, has violated Sections 5 and 12 of the Federal Trade Commission Act, and that an action by it is in the public interest, issues this complaint and alleges that:

PARAGRAPH 1. Great Earth International, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1801 Parkcourt Place, Suite A, Santa Ana, California.

PAR. 2. Respondent is, and has been engaged in the manufacture, labeling, packaging, offering for sale, promotion, sale and distribution to the public of various nutrient supplements, such as "GHR Formula-P.M.," "L-Arginine", "L-Ornithine," and other foods, as "food" is defined in the Federal Trade Commission Act, and other products.

PAR. 3. Respondent has caused to be prepared and placed for publication and has caused the dissemination of various advertising and promotional materials, including, but not limited to, the advertising and promotional materials attached hereto as Exhibits A through I, to promote the sale of its nutrient supplements and other foods and other products. As advertised, respondent's nutrient supplements are "food[s]," within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 4. Respondent operates in various states of the United States and in the District of Columbia. Respondent's manufacturing, labeling, packaging, offering for sale, promoting, sale and distribution of nutrient supplements and other foods and other products constitute the maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of its business, respondent has disseminated and caused the dissemination of advertisements and promotional materials for nutrient supplements and other foods and other products by various means in or affecting commerce, including, *inter alia,* the placement of advertisements in newspapers and national magazines distributed through the mail and across state lines. Such advertisements and promotional materials were for the purpose of inducing, and were likely to induce, directly or indirectly, the purchase by the public of respondent's nutrient supplements and other foods and products.

PAR. 6. Typical examples of respondent's advertisements and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are the advertisements and promotional materials attached hereto as Exhibits A through I. Specifically, these advertisements and promotional materials have contained the following statements:

A. In regard to "GHR Formula-P.M.":

1. "How to get the body of your dreams while you sleep. When you go to sleep, GHR Formula-P.M. goes to work. How? Simply by helping your body do more of what it already does every night. About 90 minutes after you fall asleep, your pituitary gland begins releasing Growth Hormone, which burns fat and builds muscle. But in your adult years, less Growth Hormone is released and less fat is burned. GHR Formula-P.M. is taken at bedtime, permitting it to be digested and absorbed by about the same time your pituitary begins to work its nightly magic. The result is an increase in the amount of Growth Hormone in your bloodstream. In other words, GHR Formula-P.M. helps you start regaining your youthful metabolism and lean, firm figure overnight."

2. "When you go to sleep, GHR Formula-P.M. goes to work

- Burning away fat
- Building lean muscle tissue
- Firming
- Toning
- Shaping"

3. "The nutrients in GHR Formula-P.M. can stimulate the release of Growth Hormone and raise blood levels. This improves your body's ability to burn unwanted excess body fat and build lean muscle."

4. "The special formula of Amino Acids in GHR Formula-P.M. can help raise your body's metabolic rate naturally."

5. "[M]any . . . athletes turn to anabolic steroids to accomplish their goals. GHR Formula-P.M. is a safe natural alternative for athletes. As a natural anabolic supplement it will help athletes to build lean muscle tissue and burn body fat."

6. "Lose While You SNOOZE."

7. "Many products claim to help you burn fat while you sleep but few really can. Most just don't contain the right balance of nutrients to properly stimulate the release of Growth Hormone. But GHR Formula-P.M. does! It's scientifically formulated for maximum effectiveness. **It really works!"**

8. "You can lose fat plus firm and tone your muscles without lifting a finger."

9. "Hunger Free Diet"

10. "Now you can have the firm, fat-free physique of youth with GHR Formula-P.M."

11. "Avoid Starvation Diets"

B. In regard to "L-Ornithine" and "L-Arginine":

1. "Two Amino Acids shown to help burn fat and build muscle when taken in combination."

2. "Sleep away fat! Life Extension proponents now claim rapid weight loss is possible, while you sleep, by supplementing your diet with these fat burning, muscle building amino acids."

3. "THE MUSCLE BUILDING FAT BURNING HELPERS."

4. "They help speed up healing and protect against physical and mental fatigue."

C. In regard to "L-Ornithine" only:

1. "An amino acid that functions in the body as a growth hormone and immune system stimulator. Helps protect against fatigue."

PAR. 7. Through the use, *inter alia,* of the statements set forth in paragraph six (A) through six (C), and other statements contained in advertisements or promotional materials not specifically set forth herein, respondent has represented, and now represents, directly or by implication, that:

A. GHR Formula-P.M. will:

1. Stimulate the pituitary gland to release greater amounts of human growth hormone in users of the product than in non-users of the product.

2. Alter human metabolism in such a way that the metabolism of users of the product will function in a manner similar to the metabolism of youth.

3. Burn fat, build lean muscle tissue or firm, tone or shape muscles.

4. Help athletes or muscle builders achieve results similar to the results these individuals generally believe are achievable through use of anabolic steroids, e.g., rapid and substantial muscular development.

5. Taken before sleep, will promote greater weight loss during sleep in users of the product than in non-users of the product.

B. "L-Ornithine" or "L-Arginine," or both, will:

1. Stimulate the pituitary gland to release greater amount of human growth hormone in users of the products than in non-users of these products.

2. Promote greater burning of fat or building of muscle in users of these products than in non-users of these products.

3. Promote more rapid healing and greater protection against physical and mental fatigue in users of these products than in non-users of these products.

4. Promote greater stimulation of the immune system and greater protection against fatigue in users of these products than in non-users of these products.

Par. 8. In truth and in fact:

A. GHR Formula-P.M. will not:

1. Stimulate the pituitary gland to release greater amounts of human growth hormone in users of the product than in non-users of the product.

2. Alter human metabolism in such a way that the metabolism of users will function in a manner similar to the metabolism of youth.

3. Burn fat, build lean muscle tissue or firm, tone or shape muscles.

4. Help athletes or muscle builders achieve results similar to the results these individuals generally believe are achievable through the use of anabolic steroids, e.g., rapid and substantial muscular development.

5. Taken before sleep, promote greater weight loss during sleep in users of the product than in non-users of the product.

B. "L-Ornithine" or "L-Arginine," or both, will not:

1. Stimulate the pituitary gland to release greater amounts of human growth hormone in users of these products than in non-users of these products.

2. Promote greater burning of fat or building of muscle in users of these products than in non-users of these products.

3. Promote more rapid healing and greater protection against physical and mental fatigue in users of these products than in non-users of these products.

4. Promote greater stimulation of the immune system or greater protection against fatigue in users of these products than in non-users of these products.

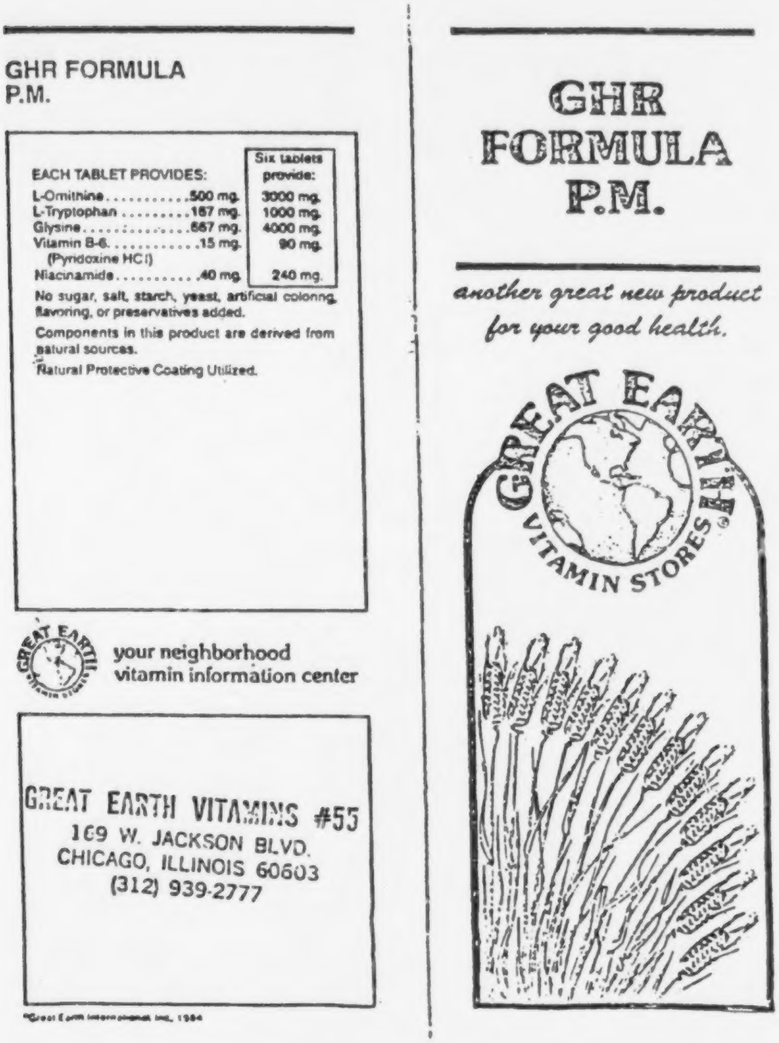
Therefore, the representations set forth in paragraph seven were, and are, false and misleading.

PAR. 9. Through the use, *inter alia*, of the representations set forth in paragraph seven, and other representations contained in advertisements or promotional materials not specifically set forth herein, respondent has represented and now represents, directly or by implication, that at the time of making the representations set forth in paragraph seven respondent has possessed and relied upon a reasonable basis for these representations.

PAR. 10. In truth and in fact, at the time of making the representations set forth in paragraph seven, respondent did not possess and rely upon a reasonable basis for making the representations. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. The aforesaid acts or practices of respondent were and are to the prejudice and injury of the public and constituted and now constitute unfair and deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act and false advertisements in violation of Section 12 of the Federal Trade Commission Act.

EXHIBIT A



GHR FORMULA
P.M.

EACH TABLET PROVIDES:		Six tablets provide:
L-Ornithine	500 mg.	3000 mg.
L-Tryptophan	167 mg.	1000 mg.
Glysine	667 mg.	4000 mg.
Vitamin B-6. (Pyridoxine HCl)	15 mg.	90 mg.
Niacinamide	40 mg.	240 mg.

No sugar, salt, starch, yeast, artificial coloring, flavoring, or preservatives added.

Components in this product are derived from natural sources.

Natural Protective Coating Utilized.

your neighborhood
vitamin information center

GREAT EARTH VITAMINS #55
169 W. JACKSON BLVD.
CHICAGO, ILLINOIS 60603
(312) 939-2777

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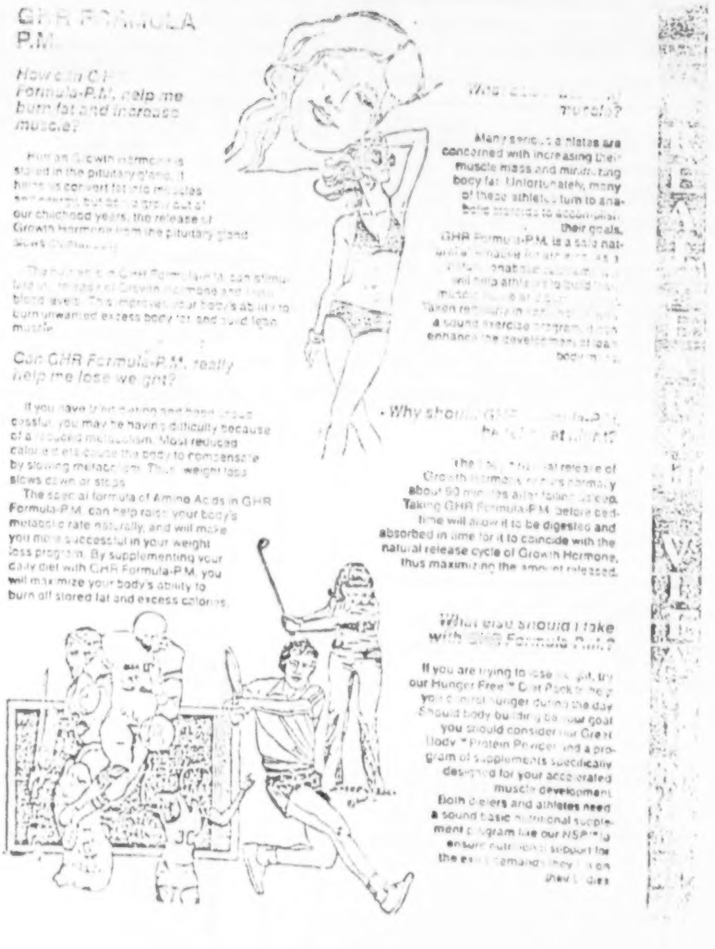
GHR
FORMULA
P.M.

another great new product
for your good health.



GHR FORMULA P.M.

How can GHR Formula-P.M. help me burn fat and increase muscle?

Human Growth Hormone is stored in the pituitary gland. It helps us convert fat into muscles and energy, but as we grow out of our childhood years, the release of Growth Hormone from the pituitary gland slows dramatically.

The nutrients in GHR Formula-P.M. can stimulate the release of Growth Hormone and raise blood levels. This improves your body's ability to burn unwanted excess body fat and build lean muscle.

Can GHR Formula-P.M. really help me lose weight?

If you have tried dieting and been unsuccessful, you may be having difficulty because of a reduced metabolism. Most reduced calorie diets cause the body to compensate by slowing metabolism. Thus, weight loss slows down or stops.

The special formula of Amino Acids in GHR Formula-P.M. can help raise your body's metabolic rate naturally, and will make you more successful in your weight loss program. By supplementing your daily diet with GHR Formula-P.M. you will maximize your body's ability to burn off stored fat and excess calories.

What about [illegible] muscle?

Many serious athletes are concerned with increasing their muscle mass and minimizing body fat. Unfortunately, many of these athletes turn to anabolic steroids to accomplish their goals.

GHR Formula-P.M. is a safe natural alternative for athletes. As a natural anabolic [illegible] it will help athletes to build their muscle mass at [illegible]. Taken regularly in [illegible] with a sound exercise program, it can enhance the development of lean body mass.

Why should GHR Formula-P.M. be taken at night?

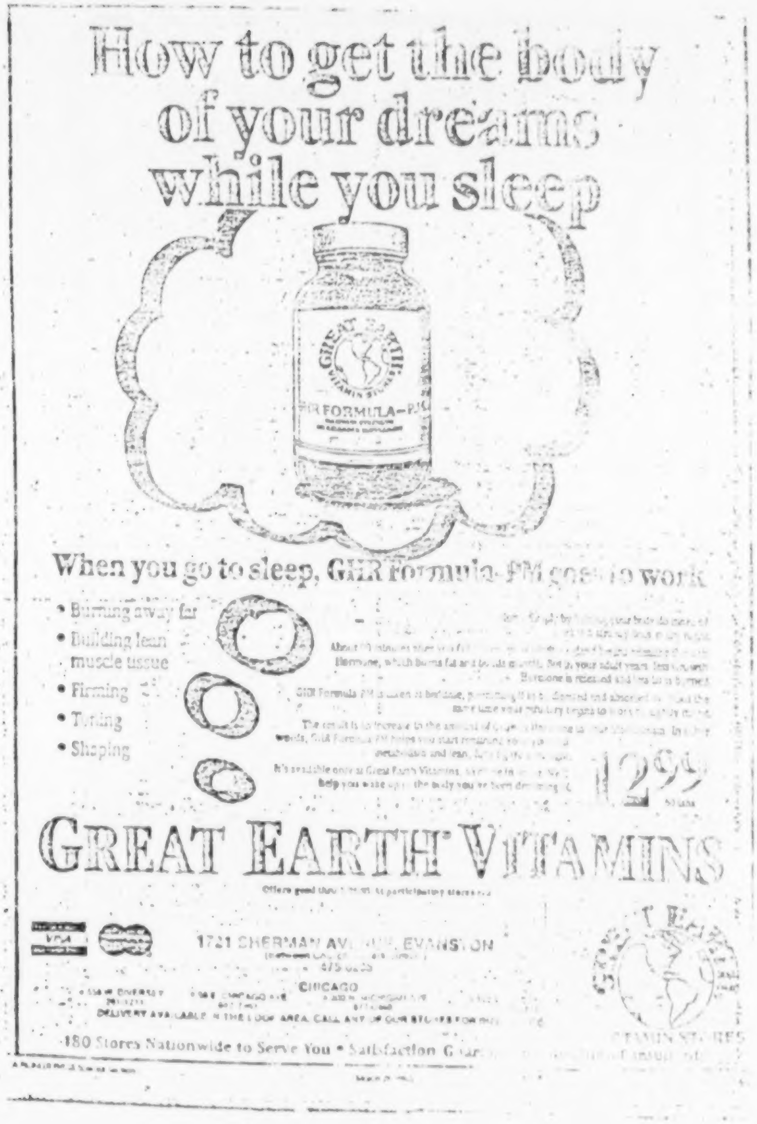
The body's natural release of Growth Hormone occurs normally about 90 minutes after falling asleep. Taking GHR Formula-P.M. before bedtime will allow it to be digested and absorbed in time for it to coincide with the natural release cycle of Growth Hormone, thus maximizing the amount released.

What else should I take with GHR Formula-P.M.?

If you are trying to lose weight, try our Hunger Free™ Diet Pack to help you control hunger during the day. Should body building be your goal you should consider our Great Body™ Protein Powder and a program of supplements specifically designed for your accelerated muscle development.

Both dieters and athletes need a sound basic nutritional supplement program like our NSP™ to ensure nutritional support for the extra demands they put on their bodies.

EXHIBIT B



How to get the body of your dreams while you sleep

When you go to sleep, GHR formula-PM goes to work

- Burning away fat
- Building lean muscle tissue
- Firming
- Toning
- Shaping

12^{99}

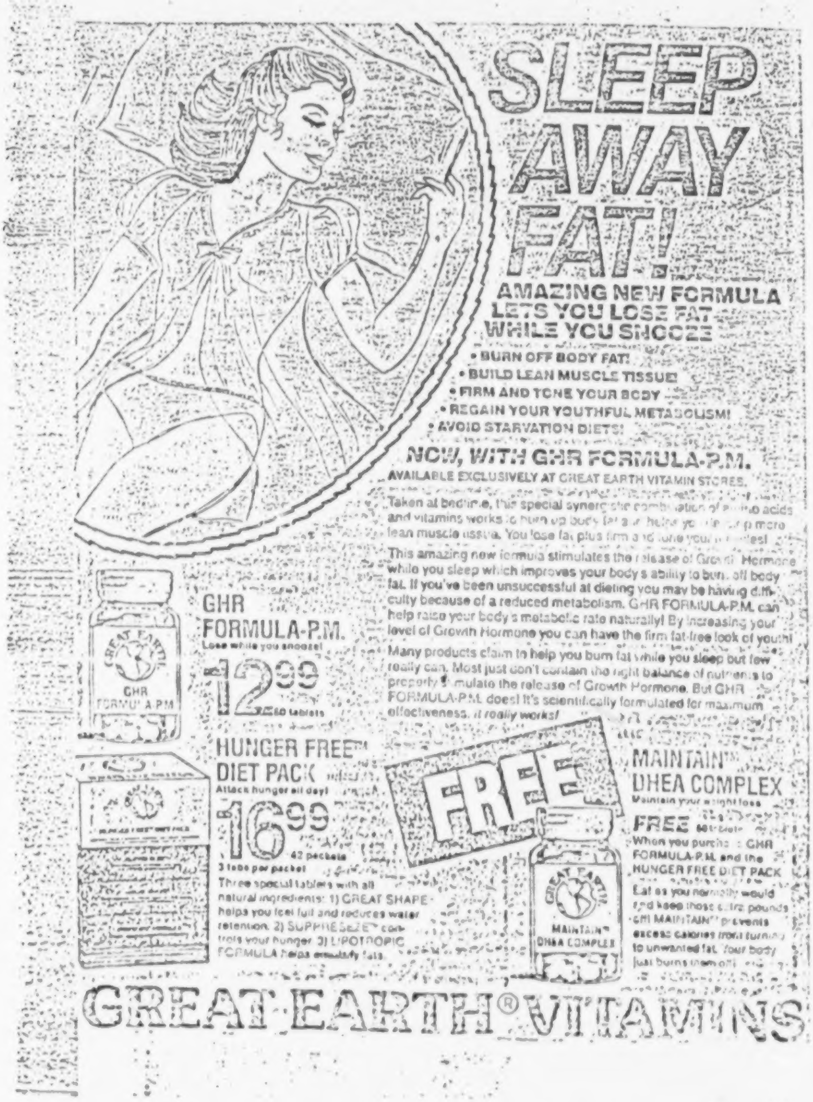
GREAT EARTH VITAMINS

1721 SHERMAN AVENUE, EVANSTON

CHICAGO

180 Stores Nationwide to Serve You • Satisfaction Guar

EXHIBIT C



SLEEP AWAY FAT!

AMAZING NEW FORMULA LETS YOU LOSE FAT WHILE YOU SNOOZE

- BURN OFF BODY FAT!
- BUILD LEAN MUSCLE TISSUE!
- FIRM AND TONE YOUR BODY
- REGAIN YOUR YOUTHFUL METABOLISM!
- AVOID STARVATION DIETS!

NOW, WITH GHR FORMULA-P.M.

AVAILABLE EXCLUSIVELY AT GREAT EARTH VITAMIN STORES.

Taken at bedtime, this special synergistic combination of amino acids and vitamins works to burn up body fat and helps you develop more lean muscle tissue. You lose fat plus firm and tone your muscles!

This amazing new formula stimulates the release of Growth Hormone while you sleep which improves your body's ability to burn off body fat. If you've been unsuccessful at dieting you may be having difficulty because of a reduced metabolism. GHR FORMULA-P.M. can help raise your body's metabolic rate naturally! By increasing your level of Growth Hormone you can have the firm fat-free look of youth!

Many products claim to help you burn fat while you sleep but few really can. Most just don't contain the right balance of nutrients to properly stimulate the release of Growth Hormone. But GHR FORMULA-P.M. does! It's scientifically formulated for maximum effectiveness. *It really works!*

GHR FORMULA-P.M.

Lose while you snooze!

12.99 60 tablets

HUNGER FREE™ DIET PACK

Attack hunger all day!

16.99 42 packets

3 tabs per packet

Three special tablets with all natural ingredients: 1) GREAT SHAPE helps you feel full and reduces water retention. 2) SUPPRESEZE™ controls your hunger. 3) LIPOTROPIC FORMULA helps emulsify fats.

FREE

MAINTAIN™ DHEA COMPLEX

Maintain your weight loss

FREE 60 tablets

When you purchase GHR FORMULA-P.M. and the HUNGER FREE DIET PACK

Eat as you normally would and keep those extra pounds off! MAINTAIN™ prevents excess calories from turning to unwanted fat. Your body just burns them off.

GREAT EARTH® VITAMINS

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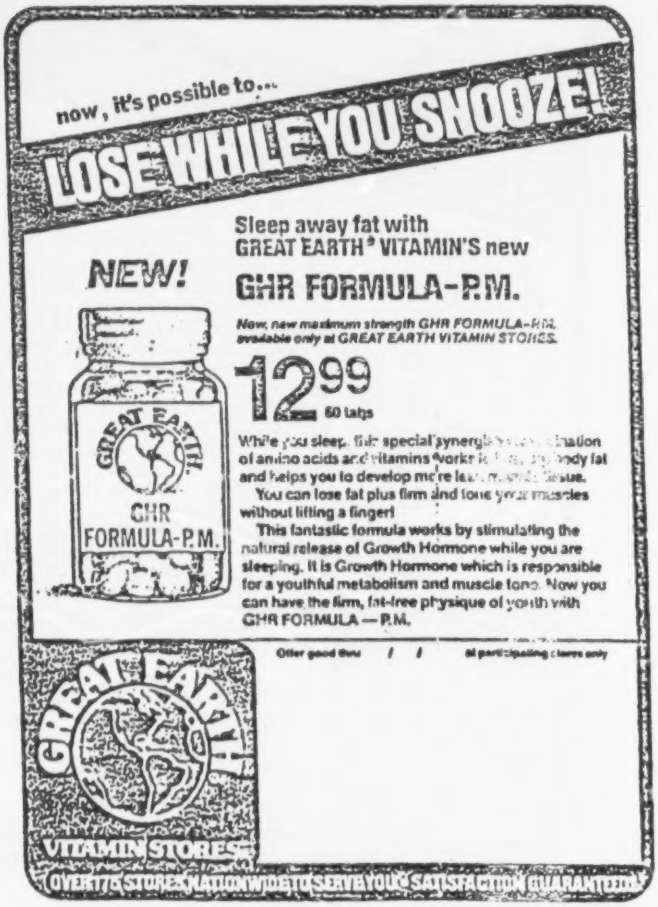
EXHIBIT D


now, it's possible to...
LOSE WHILE YOU SNOOZE!
NEW!
GREAT EARTH
GHR
FORMULA-P.M.
GREAT EARTH
VITAMIN STORES
OVER 175 STORES NATIONWIDE TO SERVE YOU SATISFACTION GUARANTEED

Sleep away fat with
GREAT EARTH® VITAMIN'S new

GHR FORMULA-P.M.

Now, new maximum strength GHR FORMULA-P.M. available only at GREAT EARTH VITAMIN STORES.

12.99
60 tabs

While you sleep, this special synergistic combination of amino acids and vitamins works [illegible] body fat and helps you to develop more lean muscle tissue.

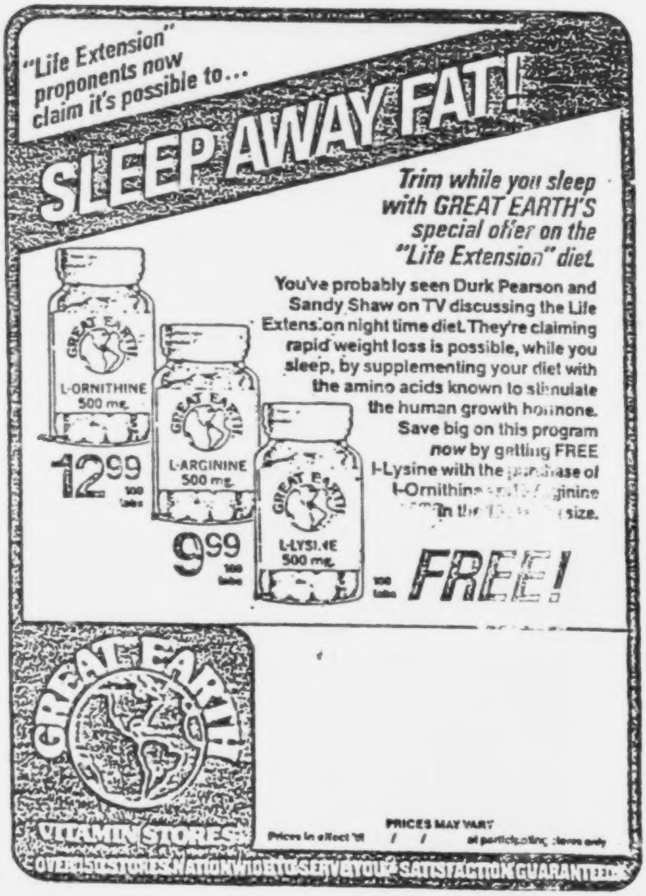
You can lose fat plus firm and tone your muscles without lifting a finger!

This fantastic formula works by stimulating the natural release of Growth Hormone while you are sleeping. It is Growth Hormone which is responsible for a youthful metabolism and muscle tone. Now you can have the firm, fat-free physique of youth with GHR FORMULA — P.M.

Offer good thru / / at participating stores only

MAR. XTRA SINGLE PRODUCT AD 3 col x 7" 91559

EXHIBIT E


L-ORNITHINE
500 mg.
12.99
100 tabs
L-ARGININE
500 mg.
9.99
100 tabs
L-LYSINE
500 mg.
100 tabs
GREAT EARTH

"Life Extension" proponents now claim it's possible to...

SLEEP AWAY FAT!

Trim while you sleep with GREAT EARTH'S special offer on the "Life Extension" diet.

You've probably seen Durk Pearson and Sandy Shaw on TV discussing the Life Extension night time diet. They're claiming rapid weight loss is possible, while you sleep, by supplementing your diet with the amino acids known to stimulate the human growth hormone. Save big on this program now by getting FREE l-Lysine with the purchase of l-Ornithine [illegible] ginine [illegible] in the [illegible] size.

FREE!

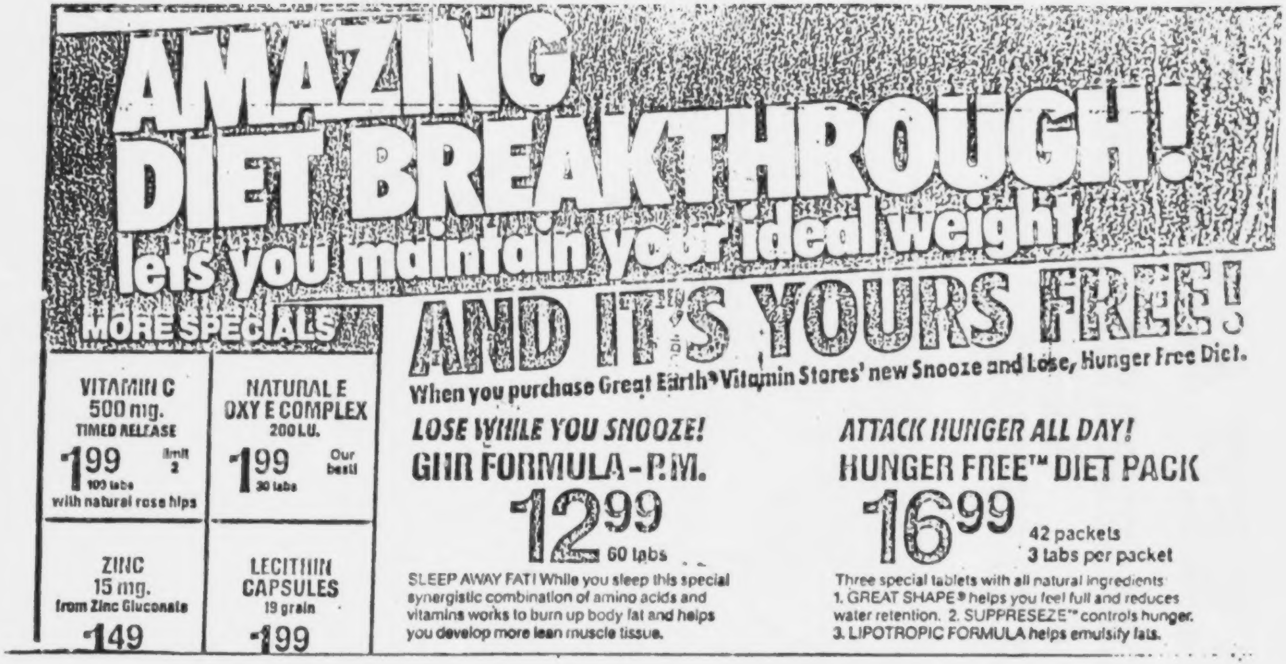
GREAT EARTH VITAMIN STORES

PRICES MAY VARY
Prices in effect 'til / / at participating stores only

OVER 150 STORES NATIONWIDE TO SERVE YOU SATISFACTION GUARANTEED

SINGLE PRODUCT [illegible] No. 91501

EXHIBIT F



AMAZING DIET BREAKTHROUGH!

lets you maintain your ideal weight

AND IT'S YOURS FREE!

When you purchase Great Earth® Vitamin Stores' new Snooze and Lose, Hunger Free Diet.

LOSE WHILE YOU SNOOZE!

GHR FORMULA-P.M.

12.99 60 tabs

SLEEP AWAY FAT! While you sleep this special synergistic combination of amino acids and vitamins works to burn up body fat and helps you develop more lean muscle tissue.

ATTACK HUNGER ALL DAY!

HUNGER FREE™ DIET PACK

16.99 42 packets 3 tabs per packet

Three special tablets with all natural ingredients: 1. GREAT SHAPE® helps you feel full and reduces water retention. 2. SUPPRESEZE™ controls hunger. 3. LIPOTROPIC FORMULA helps emulsify fats.

MORE SPECIALS

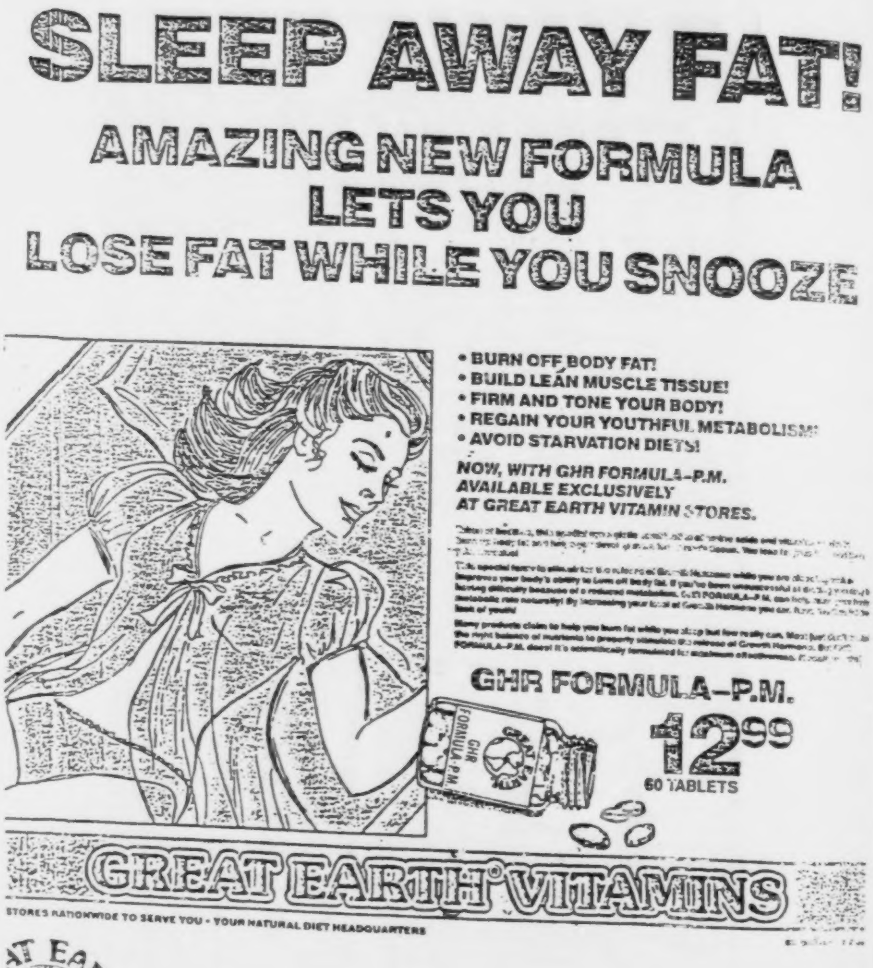
VITAMIN C 500 mg. TIMED RELEASE 1.99 limit 2 100 tabs with natural rose hips

NATURAL E OXY E COMPLEX 200 I.U. 1.99 Our best! 30 tabs

ZINC 15 mg. from Zinc Gluconate 1.49

LECITHIN CAPSULES 19 grain 1.99

EXHIBIT G



SLEEP AWAY FAT!

AMAZING NEW FORMULA LETS YOU LOSE FAT WHILE YOU SNOOZE

- BURN OFF BODY FAT!
- BUILD LEAN MUSCLE TISSUE!
- FIRM AND TONE YOUR BODY!
- REGAIN YOUR YOUTHFUL METABOLISM!
- AVOID STARVATION DIETS!

NOW, WITH GHR FORMULA-P.M. AVAILABLE EXCLUSIVELY AT GREAT EARTH VITAMIN STORES.

GHR FORMULA-P.M.

12⁹⁹

60 TABLETS

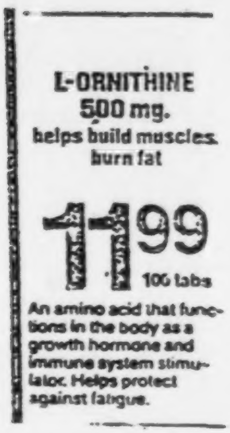
GREAT EARTH® VITAMINS

STORES NATIONWIDE TO SERVE YOU • YOUR NATURAL DIET HEADQUARTERS

AT EARTH

AMIN STORES

EXHIBIT H

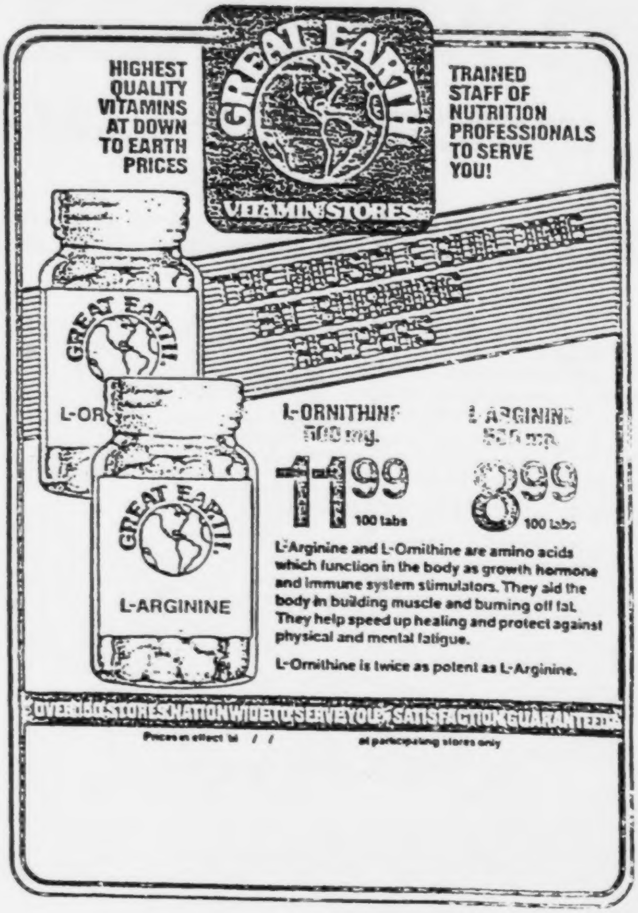


L-ORNITHINE
500 mg.
helps build muscles.
burn fat

1199
100 tabs

An amino acid that functions in the body as a growth hormone and immune system stimulator. Helps protect against fatigue.

EXHIBIT I


HIGHEST QUALITY VITAMINS AT DOWN TO EARTH PRICES
GREAT EARTH!
VITAMIN STORES
TRAINED STAFF OF NUTRITION PROFESSIONALS TO SERVE YOU!
THE MUSCLE BUILDING FAT BURNING HELPERS
GREAT EARTH!
L-OR
GREAT EARTH!
L-ARGININE
L-ORNITHINE 500 mg.
11.99 100 tabs
L-ARGININE 500 mg.
8.99 100 tabs
OVER 100 STORES NATIONWIDE TO SERVE YOU! SATISFACTION GUARANTEED

L-Arginine and L-Ornithine are amino acids which function in the body as growth hormone and immune system stimulators. They aid the body in building muscle and burning off fat. They help speed up healing and protect against physical and mental fatigue.

L-Ornithine is twice as potent as L-Arginine.

Prices in effect til / / at participating stores only

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DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Great Earth International, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1801 Parkcourt Place, Suite A, in the City of Santa Ana, State of California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent Great Earth International, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, packaging, offering for sale, selling, advertising or distributing of the nutrient supplements known from 1983 to 1987 as "GHR Formula-PM" (presently known as "Tri-Amino Plus P.M."), "L-Arginine," "L-Ornithine," or any other food of substantially similar composition, or any other free form amino acid nutrient supplement containing arginine, ornithine, tryptophane, glycine, or any combination thereof, in or affecting commerce, as "food" and "commerce" are defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any such food will:

A. Stimulate greater production or release of human growth hormone in users of such product than in non-users.

B. Alter human metabolism in such a way that the metabolism of users of such product will function in a manner similar to the metabolism of youth.

C. Help users achieve results similar to or superior to the results these users generally believe are achievable through use of anabolic steroids, *e.g.*, rapid or substantial muscular development.

D. Promote greater weight loss during sleep in users of such product than in non-users of such product, when consumed before sleep.

E. Promote greater burning of fat or building, firming, toning or shaping of muscle in users of such product than in non-users.

F. Promote more rapid healing and greater protection against physical and mental fatigue in users of such product than in non-users.

G. Promote greater stimulation of the immune system and greater protection against fatigue in users of such product than in non-users.

II.

It is further ordered, That respondent Great Earth International, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, packaging, offering for sale, selling, advertising or distributing of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any such product will:

A. Beneficially affect, cure, prevent or reduce the risk of any disease or any other undesirable physical, mental or emotional state or condition;

B. Improve or strengthen any bodily part, organ, system, function or ability;

C. Eliminate, inhibit, reduce or otherwise neutralize or render harmless any harmful substance or organism that may be found in the body or environment; or

D. Assist or enable a user to lose or control weight or fat, or suppress appetite

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. *"Competent and reliable"* shall mean for purposes of this order tests, analyses, research, studies or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in that profession or science to yield accurate and reliable results.

III.

It is further ordered, That respondent Great Earth International, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from using the name "Growth Hormone Releaser," "GHR" or any other name of similar meaning as a brand name or description for any product, unless such product stimulates the body to produce, or the pituitary gland to release, significantly greater amounts of human growth hormone in users than in non-users and, at the time of using such name, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation inherent in use of such name.

IV.

It is further ordered, That respondent, its successors and assigns, shall, for at least three (3) years after the last dissemination of the representation, maintain and upon reasonable request make available to the Federal Trade Commission at a place it designates for inspection and copying copies of:

A. All materials that respondent relied upon in making any representation covered by this order.

B. All test reports, studies, surveys, or demonstrations in its possession or control that contradict any such representation.

V.

It is further ordered, That respondent shall notify the Commission within thirty (30) days before any changes in the respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change which may affect compliance obligations arising out of this order.

VI.

It is further ordered, That respondent shall, within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

THE B.F. GOODRICH COMPANY, ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9159. Complaint, Jan. 4, 1982—Final Order, Mar. 15, 1988

This final order requires Goodrich, a corporation with its principal place of business in Akron, Ohio, to divest the vinyl cloride monomer (VCM) plant, in La Porte, Texas, at no minimum price, to a Commission-approved acquirer and also to provide all supporting material to the acquirer. Diamond Shamrock Chemicals Company is prohibited from interfering with the divestiture and, for five years, must continue to supply all utilities, services, and supplies to the acquirer. In addition, Goodrich must, for 10 years, receive FTC approval before acquiring any interest in any producer of VCM located in the United States. The Commission also dismissed part of the complaint concerning the polyvinyl chloride (PVC) market.

Appearances

For the Commission: *Rhett Krulla.*

For the respondents: *Tom D. Smith, Jones, Day, Reavis & Pogue,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents, The B.F. Goodrich Company, Diamond Shamrock Corporation and Diamond Shamrock Plastics Corporation, corporations subject to the jurisdiction of the Federal Trade Commission, have entered into an agreement, described in paragraph 11 herein, that, if consummated, would violate the provisions of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); that said agreement and the actions of respondents to implement that agreement constitute violations of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

1. For purposes of this complaint, the following definitions shall apply: [2]

a. *"Polyvinyl chloride"* or *"PVC"* means any vinyl chloride homopolymer with the repeating unit $CH_2{=}CHC1$, and any copolymers of vinyl chloride with varying amounts of other chemicals, including vinyl acetate, ethylene, propylene, vinylidene chloride, or acrylates;

b. *"Bulk and suspension PVC"* includes PVC produced by the bulk or mass process, in which vinyl chloride is polymerized without the addition of other liquids; and PVC produced by the suspension process, in which vinyl chloride monomer droplets are suspended in an aqueous system.

c. *"Dispersion PVC"* includes PVC produced by the emulsion or dispersion process;

d. *"Vinyl chloride monomer"* or *"VCM"*, is a gaseous, reactive, acyclic intermediate chemical, used principally in the manufacture of PVC. VCM, also called chloroethylene or monochloroethylene, has a chemical identity $CH_2{=}CHC1$.

II. THE B.F. GOODRICH COMPANY

2. Respondent, The B.F. Goodrich Company ("Goodrich"), is, and at all times relevant herein, has been a corporation organized, existing, and doing business under and by virtue of the laws of New York, with its principal place of business in Akron, Ohio.

3. For the year ending December 31, 1980, Goodrich's net sales were approximately $3.08 billion, and its net income was approximately $61.7 million. As of December 31, 1981, Goodrich's bulk and suspension PVC and VCM production capacities were approximately 1.345 billion pounds and 1 billion pounds per year, respectively.

4. Goodrich is a multinational company engaged in the manufacture and sale of a broad line of chemical, plastic, rubber, and other products which are distributed in over [3] 100 countries throughout the world.

5. Goodrich is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. DIAMOND SHAMROCK CORPORATION

6. Respondent, Diamond Shamrock Corporation ("Diamond Shamrock") is, and at all times relevant herein has been, a corporation organized, existing, and doing business under and by virtue of the

laws of Delaware, with its principal office and headquarters in Dallas, Texas.

7. For the calendar year ending December 31, 1980, Diamond Shamrock's sales and operating revenues were approximately $3.143 billion, and its net income was approximately $201 million. As of December 31, 1981, Diamond Shamrock's bulk and suspension PVC and VCM production capacities were approximately 510 million pounds and 1 billion pounds per year, respectively.

8. Diamond Shamrock is a diversified international corporation involved in the exploration and production of natural gas and crude oil, the refining and marketing of petroleum products, and the production of coal, chemicals, plastics, and technology.

9. Diamond Shamrock is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. [4]

IV. DIAMOND SHAMROCK PLASTICS CORPORATION

10. Diamond Shamrock Plastics Corporation ("DSPC") was established by Diamond Shamrock in 1980 in order to facilitate divestiture of Diamond Shamrock's Plastics Division. Upon establishment of DSPC as a wholly-owned subsidiary, Diamond Shamrock transferred all of its PVC and VCM assets and business to DSPC and has continued to conduct these businesses through DSPC. Diamond has subsequently restructured DSPC to include only those assets it has agreed to transfer to Goodrich. Diamond Shamrock will establish a new corporation to hold the remaining PVC assets and business of the company pending their disposition by Diamond Shamrock.

V. THE ACQUISITION

11. Under the terms of the agreement between Goodrich and Diamond Shamrock, on or about December 31, 1981, Goodrich will acquire from Diamond Shamrock all the stock of DSPC for $131 million. Pursuant to Diamond Shamrock's agreement with Goodrich, prior to its acquisition by Goodrich, DSPC has been restructured to include a one-billion pound-per-year capacity VCM plant at La Porte Texas, and a 280 million pound-per-year capacity suspension PVC plant (plant No. 5) at Deer Park, Texas, selected research and development equipment, process and application equipment, and personnel and other assets required to operate those plants. Consummation of the transaction is subject to the execution of agreements between Goodrich and Diamond Shamrock concerning feedstock supplies.

VI. TRADE AND COMMERCE

12. For purposes of this complaint, the relevant lines of commerce are VCM, bulk and suspension PVC, dispersion PVC and any submarket thereof. [5]

13. For purposes of this complaint, the relevant geographic market is the United States as a whole, and any submarket thereof.

14. In 1980, approximately 6.47 billion pounds of VCM were produced in the United States. The VCM market is concentrated. In 1981, the two leading manufacturers accounted for approximately 37.9 percent of industry nameplate (design) capacity, the four leading manufacturers accounted for 58.4 percent; and the eight leading manufacturers accounted for 92.1 percent.

15. Goodrich and Diamond Shamrock are tied as the third leading manufacturer of VCM, each holding 10.3 percent of industry nameplate capacity in 1981.

16. Goodrich and Diamond Shamrock are direct, substantial, and actual horizontal competitors in the VCM market.

17. Barriers to entry into the VCM market are significant and substantial.

18. In 1980, approximately 4.88 billion pounds of bulk and suspension PVC were produced in the United States.

19. The bulk and suspension PVC market is moderately concentrated. In 1981, the two leading manufacturers accounted for approximately 29.3 percent of industry nameplate capacity, the four leading manufacturers accounted for 48.0 percent, and the eight leading manufacturers accounted for 78.9 percent.

20. Goodrich is the leading producer of bulk and suspension PVC, with approximately 17.4 percent of industry nameplate capacity in 1981.

21. Goodrich has grown through acquisition in the bulk and suspension PVC market. In 1979, Goodrich acquired a 200 million pound-per-year bulk and suspension PVC plant in Plaquemine, Louisiana, from The Goodyear Tire and Rubber Company. At [6] the time of this acquisition, Goodrich held 15.5 percent of industry capacity. The acquired plant gave Goodrich an additional 3.1 percent of industry capacity.

22. Diamond Shamrock is the sixth leading producer of bulk and suspension PVC with approximately 6.6 percent of industry nameplate capacity and 8.9 percent of practical production capacity in the market in 1981. Pursuant to the transaction, approximately half of Diamond Shamrock's production capacity will be transferred to Goodrich, raising its market share to approximately 20.8 percent of industry nameplate capacity.

23. Goodrich and Diamond Shamrock are direct, substantial, actual, horizontal competitors in the bulk and suspension PVC market.

24. Barriers to entry into the bulk and suspension PVC market are significant.

25. In 1979, approximately 496 million pounds of dispersion PVC were produced in the United States.

26. The dispersion PVC market is highly concentrated. In 1980, the two leading manufacturers accounted for approximately 51.7 percent of industry nameplate capacity, the four leading manufacturers accounted for 78.3 percent, and the eight leading manufacturers accounted for 100 percent.

27. Goodrich is the leading producer of dispersion PVC with approximately 26.6 percent of industry nameplate capacity in 1980.

28. Diamond Shamrock is the fourth leading producer of dispersion PVC with approximately 11.8 percent of industry nameplate capacity in the market in 1980. Following the transaction with Goodrich, Diamond Shamrock is likely to shut down or sell its dispersion PVC plant facilities. These facilities are not currently included in the Goodrich acquisition. **[7]**

29. Goodrich and Diamond Shamrock are direct, substantial, actual, horizontal competitors in the dispersion PVC market.

30. Barriers to entry into the dispersion PVC market are significant.

VII. EFFECTS OF THE ACQUISITION

31. The effect of the aforesaid acquisition may be substantially to lessen competition or to tend to create a monopoly in the relevant lines of commerce in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. It will eliminate actual competition between Goodrich and Diamond Shamrock in the relevant lines of commerce;

b. It will increase concentration in the relevant lines of commerce and reduce the number of firms competing in those markets. In the VCM market, two-firm concentration will increase from approximately 37.9 percent to 42.6 percent and four-firm concentration will increase from approximately 58.4 percent to 68.7 percent. In the bulk and suspension PVC market, two-firm concentration will increase from approximately 29.3 percent to 32.9 percent and four-firm concentration will rise from approximately 48.0 percent to 51.7 percent.

32. Diamond Shamrock may also be eliminated as a competitor in the production and distribution of dispersion PVC which is a separate

line of commerce from bulk and suspension PVC as defined above. Although Diamond Shamrock's dispersion PVC capacity will not be transferred to Goodrich under the terms of the agreement described in paragraph 11 herein, by virtue of that agreement, Diamond Shamrock may exit this [8] market as a substantial competitor.

VIII. VIOLATIONS CHARGED

33. The steps taken to consummate the acquisition of the stock and assets of DSPC by Goodrich from Diamond Shamrock, as set forth in paragraph 11 herein, and the agreements pursuant to which that acquisition is to be effected, constitute violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

34. The proposed acquisition of the stock and assets of DSPC by Goodrich from Diamond Shamrock, as set forth in paragraph 11 herein, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

INITIAL DECISION BY

THOMAS F. HOWDER, ADMINISTRATIVE LAW JUDGE

SEPTEMBER 20, 1985

PRELIMINARY STATEMENT

The Commission issued its complaint in this proceeding on January 4, 1982, charging that the acquisition of Diamond Shamrock Plastics Corporation ("DSPC") by The B.F. Goodrich Company ("Goodrich") from Diamond Shamrock Chemicals Company ("Diamond Shamrock" or "Diamond") (formerly Diamond Shamrock Corporation) violated Section 7 of the Clayton Act, 15 U.S.C. 18; and that both the acquisition and the concomitant agreement and steps taken to consummate the transaction violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

The complaint alleged that the effect of the challenged acquisition would be to eliminate actual competition between Goodrich and Diamond and increase the levels of concentration in two product markets, *viz.*, bulk and suspension polyvinyl chloride ("PVC"),[1] and vinyl chloride monomer ("VCM").[2]

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[1] Unless otherwise indicated herein, the initials "PVC" will refer to "bulk and suspension" PVC, not to other formulations of PVC.

[2] The complaint also alleged violation in a third market, *viz.*, "dispersion" PVC. However, complaint counsel elected not to pursue this allegation and no evidence was offered concerning it (see complaint counsel's trial brief, p. 2, n. 2).

Following extensive discovery, and various prehearing conferences, adjudicative hearings commenced on November 24, 1984 and continued at intervals until March 22, 1985. The evidentiary record was closed on March 26, 1985. The parties have submitted detailed proposed findings and briefs in support of their respective positions.

Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied.

This proceeding is before me upon the complaint, answers, testimony and other evidence, and the proposed findings of fact and conclusions of law filed by counsel supporting the complaint and by counsel for respondents. The proposed findings of fact, conclusions and arguments of the parties have been considered, and those findings not adopted either in the form proposed or in [3] substance are rejected as not supported by the evidence or as involving immaterial issues not necesssary for this decision.[3]

Having heard and observed the witnesses, and after having reviewed the entire record in this proceeding, I make the following findings:

FINDINGS OF FACT

I. THE RESPONDENTS

A. The B.F. Goodrich Company

1. Respondent Goodrich, the acquiring company, is a New York corporation headquartered in Akron, Ohio. [ ] (Complaint ¶ 3; Goodrich Answer ¶ 3; CX 8B; CX 109E *in camera;* RX 192Z–58 *in camera;* RX 312A). For the year ending December 31, 1980, Goodrich had net sales of approximately $3.08 billion, with net income of approximately $61.7 million. Its total assets at that time were listed at approximately $2.2 billion (Complaint ¶ 3; Goodrich Answer ¶ 3; CX 8Z–30, 31).

2. [ ] (CX 4Z–73; CX 22 *in camera,* CX 23A; CX 299P–S *in camera*). [ ] (CX 23A; CX 336C *in camera;* CX 662D *in camera*).

3. At the time of the acquisition, Goodrich owned and operated a

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[3] Certain abbreviations, including the following, are used in this decision:

CX - Commission's exhibit
CPF - Complaint counsel's proposed finding
RX - Respondents' exhibit
RPF - Respondents' proposed finding

The transcript of testimony is usually referred to with the last name of the witness and the page number or numbers upon which the testimony appears.

VCM plant at Calvert City, Kentucky. [ ] (CX 4Z–73; CX 109Z–3 *in camera;* DiLiddo 3353). [4]

B. Diamond Shamrock Chemicals Company

4. Respondent Diamond Shamrock, the seller of the acquired company, is a Delaware corporation headquartered in Dallas, Texas. It is a diversified international company involved in the exploration and production of natural gas and crude oil, the refining and marketing of petroleum products, the production of coal, chemicals and plastics, and the development of technology (Complaint ¶ 7; Diamond Answer ¶ 7; CX 104Z). For the year ending December 31, 1980, Diamond's sales and operating revenues were approximately $3.143 billion, with net income of approximately $201 million. Its total assets at that time were listed at approximately $2.8 billion (*ibid.;* CX 401B; CX 401Z–12).

5. At the time of the acquisition, Diamond Shamrock conducted the major portion of its PVC operations at Deer Park, Texas. This consisted of several suspension production facilities designated Plants # 1, # 3, # 4, # 4X and # 5, and one dispersion resin unit designated Plant # 2 (CX 371H-I; CX 418B). [ ] (Schaefer 1070–71; Becker 1253; CX 11B *in camera;* CX 351Q,U; CX 511B *in camera*). The combined annual nameplate capacity at Deer Park amounted to approximately 500 million pounds per year (CX 371I). [ ] (CX 11C *in camera;* CX 367A *in camera;* CX 371L; CX 418B; CX 511B *in camera;* Diamond Adm. 23–24; CX 6Z–9).[4]

6. Located adjacent to the Deer Park complex was Diamond Shamrock's Independence VCM facility at LaPorte, Texas. [ ] (Diamond Adm. 1 and 274; CX 6A and 6L; CX 295Z–44, 45 *in camera;* CX 11B *in camera;* CX 405Z; CX 414A).

C. Diamond Shamrock Plastics Corporation

7. Diamond Shamrock Plastics Corporation ("DSPC") was organized as a wholly-owned subsidiary by Diamond Shamrock in 1980 as a successor to Diamond Shamrock's Plastics Division. [5] [ ] (Diamond Adm. 308; CX 6M; CX 30Z–18; CX 367A *in camera*).

8. [ ] (Complaint ¶ 10; Answer of Diamond Shamrock ¶ 10; Goodrich Adm. 298–99; CX 4Z–12; Diamond Adm. 333–34; CX 6N; CX 295Z–94 *in camera*). [ ] (Goodrich Adm. 25; CX 4E; Arp 3502; CX 295Z–85 *in camera;* CX 11D *in camera*). [ ] (CX 3Z–583 *in camera*).

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[4] In addition, Diamond Shamrock held a [—] percent interest in a [—] million pounds-per-year bulk PVC plant in Alberta, Canada, through a joint venture with Alberta Gas Trunkline Company, Ltd. (CX 401Z–38; CX 300Z–11–13 *in camera;* CX 371A).

II. JURISDICTION

9. The question of jurisdiction is not in dispute. Both respondents Goodrich and Diamond Shamrock filed answers admitting to being subject to the jurisdiction of the Federal Trade Commission. In addition, both corporations admitted to having engaged in commerce and to being corporations whose business is in or affecting commerce within the meaning of the relevant statutes cited in the complaint (Complaint, Introductory Paragraph and ¶¶ 5, 9; Introductory Paragraphs of both Answers; Goodrich Answer ¶ 5; Diamond Answer ¶ 9).

III. THE ACQUISITION

10. [ ] (Goodrich Adm. 297–98; CX 4Z–12; Diamond Adm. 332; CX 66N *in camera;* DiLiddo 3203; CX 2Z–17,18 *in camera;* CX 11N *in camera;* CX 452).

11. [ ] (CX 2C,R *in camera;* CX 3Z–586–97 *in camera*).

12. [ ] (DiLiddo 3206–07; Schaefer 1113–14, 1175–76; Arp 3498–99; CX 2Z–10,11 *in camera;* CX 2Z–326–32 *in camera;* CX 555A *in camera*), [ ] (CX 2Z–5,6 *in camera*), [ ] (CX 3Z–285–333 *in camera*), [ ] (CX 2Z–107–18 *in camera*), [ ] (CX 2Z–326–32 *in camera*). **[6]**

13. [ ] (Schaefer 1177; CX 2Z–333–63 *in camera* and CX 2Z–374–412 *in camera*); (DiLiddo 3205–07; Schaefer 1113–16; CX 3Z–226–44 *in camera;* CX 561 *in camera*). [ ] (CX 3Z–217–23 *in camera;* CX 414Z–7; CX 453), [ ] (CX 2Z–420–587 *in camera*).

14. [ ] (Schaefer 1183; CX 300Z–25 *in camera;* CX 353J *in camera;* CX 555A *in camera*). [ ] (CX 300Z–24 *in camera*). [ ] (Schaefer 1118–19; CX 555D *in camera*). [ ] (CX 555A *in camera*). Diamond permanently closed these remaining plants in December 1983 (CX 455).

IV. RELEVANT GEOGRAPHIC MARKET

15. The parties have stipulated that the United States as a whole is the relevant geographic market within which to evaluate the likely competitive impact of the challenged acquisition (CPF 4.06, 21.01).

V. RELEVANT PRODUCT MARKET

16. The parties have also stipulated that bulk and suspension PVC is a relevant product market within which to evaluate the likely competitive impact of the acquisition (CX 4J–K; CX 6D,Z–37). The parties, however, disagree as to whether VCM constitutes a relevant market. For purposes of this decision, however, VCM has been treated as a relevant market.

A. *Bulk and suspension PVC*

17. Stated simply, PVC is a thermoplastic resin derived basically from the chemicals ethylene and chlorine. These chemicals are first converted into ethylene dichloride ("EDC"), from which the product VCM is manufactured by a cracking **[7]** process. The VCM molecules are thereafter linked together by a polymerization process to form PVC. PVC resin is manufactured in the form of white powder granules (Disch 626; McMath 1894; CX 427H).

18. [ ] (see Becker 1269–73, 1276, 1303, 1307–11, 1316–17, 1324; Eades 1464–65; Liao 1540; H. Wheeler 1727–28, 1752–53; Weber 1806–08; McMath 1895–96; Belt 1988; Yu 2093–94; RX 140Z–26 *in camera;* RX 287E-F; RX 938 *in camera*).[5]

1. PVC manufacturing processes

19. All PVC is produced by a polymerization process which links VCM molecules together in a vessel commonly referred to as a reactor, under specific temperatures in the presence of catalysts (CX 427I-K; see Disch 642; RX 125T-U; RX 218D). Reactors range in size from less than 2,500 gallons to about 50,000 gallons (see Disch 638, 640; Schaefer 1071; RX 305).

20. Within the broad category of PVC resins there are essentially three types; (1) suspension resins, (2) dispersion (or emulsion) resins, and (3) bulk (or mass) resins (CX 30G; CX 427I-K).

21. Suspension resins are produced by a polymerization process which adds suspension agents to VCM. This results in the formation of relatively large particles of PVC, and permits a low energy consumptive process to be used in the drying stage (Disch 617–29; RX 125U-W). Suspension resins account for about 85 percent of all PVC manufactured in the United States (Disch 627–28; CX 30G; RX 125T).

22. Dispersion resins are produced by a polymerization process known as emulsion polymerization, during which emulsifying, rather than suspension, agents are added to VCM to prevent the coalesence of polymer particles (Disch 630; RX 125W- **[8]** Y). As a result, very small particles of PVC are formed, and an expensive, energy intensive spray process must be used in the drying stage (Disch 630). [ ] (CX 518G *in camera*). As noted *supra,* n. 2, dispersion resins are not at issue in this proceeding.

23. Bulk resins are produced by a process which differs from the manufacture of suspension and dispersion resins, in that the VCM is

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[5] A number of manufacturing methods are used in the production of bulk and suspension PVC end-use fabricated products. The extrusion process consists of forcing PVC resin through a die. In calendering, the resin is pressed between rolls or plates to form thin sheets. Various kinds of molding can also be employed, including injection molding for pipe fittings, compression molding for phonograph records, and blow molding for bottles (CX 427M; CX 642Z–23).

polymerized without the addition of other liquids (Disch 629; RX 125Y). Bulk polymerization consists of a two-stage process, which yields a resin comparable to suspension resin in appearance and characteristics. However, the final product is considered purer because of the absence of emulsifiers or suspension agents (CX 50V-W; CX 427K). Consequently, bulk polymerization is important for end-use applications where greater optical clarity is desired, such as in the case of packaging materials (Disch 631; see CX 427L).[6]

24. Within a general range of applications, PVC resins produced by either bulk or suspension polymerization are interchangeable. Either process can produce resins of varying molecular weight, density, particle size, and porosity. The major distinction, as noted, is purity (Disch 631–36; CX 12A).

25. Within the wide range of bulk and suspension resins, there are numerous types or grades. While there may be some disagreement as to how the various grades should be classified, industry members generally divide them into three broad categories: pipe and extrusion grade resins, general purpose grade resins, and film or specialty grade resins (Schaefer 1121; Becker 1262–63; McMath 1893).

26. The end use for a particular resin determines what molecular weight or density is required (H. Wheeler 1726–27; CX 427H). Low molecular weight resins are used to produce bottles, flooring, certain types of film, pipe, pipe fittings and other products formed by injection molding. Medium molecular weight resins are used to produce sheet, film and coated fabrics. [ ] (H. Wheeler 1726–27; McMath 1911–12, 1920; RX 266B-E *in camera*). **[9]**

2. PVC history

27. [ ] (CX 200M *in camera*). [ ] (DiLiddo 3106; CX 92G; CX 40Z–2 *in camera*).

28. The initial real growth and development of bulk and suspension PVC occurred in the 1950's and 1960's, as flexible (plasticized) PVC resin found end-use markets in wire and cable, calendered sheet, and specialty applications. [ ] (RX 639H *in camera;* see DiLiddo 3106–08).

29. [ ] (RX 639H *in camera*). [ ] (RX 639H,P *in camera*). As demand for bulk and suspension PVC resin shifted toward large volume, commodity grade end-use applications, PVC manufacturers began to install large reactors of from [__] to [__] gallon capacity to service this demand. [ ] (Disch 641, 648–653; CX 374G,Q *in camera;* CX 405R; CX 420F; CX 428Z–12).

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[6] Mr. Disch of Tenneco referred in his testimony to a fourth PVC manufacturing process called solution, in which "[r]ather than water or some other medium, they use various solvents and solutions as the medium." He testified that this was "a very specialized area," accounting for less than 1 percent of U.S. capacity, with the world's only solution facility located in the U.S. (Disch 630–31).

B. VCM

30. The manufacturer of PVC depends upon a single critical feedstock—VCM—described in the Complaint as a "gaseous, reactive, acrylic intermediate chemical" (Complaint, ¶ 1.d., Goodrich Adm. 39, CX 4G; CX 427H).

31. With minor exceptions, VCM's only use is in the manufacture of PVC. [ ] (DiLiddo 3301; L. Wheeler 918–19; CX 46A; CX 200M *in camera;* CX 376L *in camera;* CX 404Z–15; CX 427W; CX 642Z–7).

32. VCM is produced by thermally cracking purified EDC at high temperatures (Wheeler 918–26; Keinholz 756–58); the EDC having been produced in a VCM plant by two related processes: oxyhydrochlorination of ethylene and direct chlorination of ethylene. [ ] **[10]** (Goodrich Adm. 44–45; CX 4G; Diamond Shamrock Adm. 44–45; CX 6C; L. Wheeler 917, CX 18A; CX 355B *in camera;* CX 427I).[7]

VI. PVC QUANTITATIVE ANALYSIS

A. U.S. PVC producers

33. At the time of the acquisition in January 1982, there were seventeen producers of bulk and suspension PVC in the United States.[8] [ ] (CX 664U; CX 661Z–14 *in camera*).

34. [ ] (CX 662D *in camera*), [ ] (CX 662F *in camera*). [ ] (CX 661Z–16, *in camera;* **[11]** CX 664R *in camera*). [ ] (CX 664C,J,R *in camera*).

35. Diamond Shamrock ranked [__] in industry nameplate capacity and [__] in industry practical production capacity at the time of the acquisition. [ ] (CX 662D *in camera;* CX 662F *in camera*). The Deer Park, Texas Plant #5, the one acquired by Goodrich, represented [__] percent of 1982 industry nameplate capacity and [__] percent

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[7] Initially, VCM was produced by the hydrochlorination of acetylene (CX 40Q *in camera;* CX 39T *in camera;* CX 200H *in camera*). Prior to 1960, virtually all VCM in the United States was made using acetylene as the primary feedstock (RX 57U *in camera*). However, acetylene supply became inadequate to support the growing demand for VCM following World War II. As a result, the VCM industry began shifting to ethylene-based technology during the 1950's, when development in the petrochemical industry provided a plentiful ethylene supply (CX 40R *in camera;* CX 39U *in camera;* CX 200I *in camera;* RX 57U *in camera*). In 1963, Goodrich developed the "oxyhydrochlorination" process, which, by utilizing the byproduct from the primary production stage, completely eliminated acetylene from the VCM process (CX 40R *in camera;* CX 39U *in camera;* CX 92G). Today, ethylene-based technology, with its subsequent refinements, continues to be the VCM production technology of choice world-wide (CX 40R *in camera;* CX 39U *in camera*). All VCM plants that have been built since the late 1960's have employed the ethylene technology (see, *e.g.*, RX 57W-X *in camera;* Goodrich Adm. 43, CX 4G; Diamond Shamrock Adm. 43, CX 6C).

[8] These seventeen producers were: The B.F. Goodrich Company, Tenneco Polymers, Inc., Georgia-Pacific Corporation, Shintech Incorporated, Occidental Chemical Corporation, Diamond Shamrock Chemicals Co., Conoco, Inc., Borden, Inc., Air Products & Chemicals, Inc., CertainTeed Corporation, Formosa Plastics Corporation, Stauffer Chemical Company, The General Tire & Rubber Co., Ethyl Corporation, Great American Chemical Corp., Keysor-Century Corporation, and Pantasote, Inc.

of industry practical production capacity.[9] [ ] (CX 661Z–16 *in camera;* CX 664B *in camera*).

36. Tenneco Polymers, Inc. ranked [__] among bulk and suspension PVC producers in both industry nameplate and practical production capacities at the time of the acquisition. [ ] (CX 662D,F *in camera*). [ ] (CX 661Z–28 *in camera;* CX 6640,U *in camera*).

37. [ ] (CX 662D,F *in camera*). [ ] (CX 661Z–28 *in camera;* CX 664Q *in camera*).

38. Shintech Incorporated ranked [__] in practical production capacity and [__] in nameplate capacity immediately prior to the acquisition. [ ] (CX 662D,F *in camera*). [ ] (CX 661Z–28 *in camera;* CX 664T *in camera*). [12]

39. In January 1982, Conoco, Inc., ranked [__] in industry nameplate capacity and [__] in industry practical production capacity. [ ] (CX 662D,F *in camera*). [ ] (CX 661Z–28 *in camera;* CX 664P *in camera*).

40. [ ] (CX 662D *in camera*). [ ] (CX 313A-Q *in camera;* CX 662F *in camera*). [ ] (CX 664S *in camera*).

41. (CX 662D,F *in camera*). In 1981, Borden also ranked [__] in bulk and suspension PVC production, with a market share of [__] percent (CX 661Z–28 *in camera;* CX 664P *in camera*).

42. Air Products and Chemicals, Inc., ranked [__] in the production of bulk and suspension PVC by all measurements in January 1982. [ ] (CX 662D,F *in camera*). [ ] (CX 661Z–28 *in camera;* CX 664"O" *in camera*).

43. CertainTeed Corporation was the [__] ranking PVC producer in all categories of measurement prior to the acquisition. [ ] (CX 662D,F *in camera*). [ ] (CX 661Z–28 *in camera;* CX 664 *in camera*).

44. Formosa Plastics Corporation ranked [__] in PVC production capacity in January 1982. At the time of the acquisition Formosa accounted, respectively, for [__] percent and [__] percent of PVC nameplate and practical production capacities (CX 662D,F *in camera*). In 1981, Formosa ranked [__] in the production of PVC with a market share of [__] percent (CX 661Z–28 *in camera;* CX 664Q *in camera*). [ ] (CX 662D,F *in camera*). [13]

45. Prior to the shutdown of its Long Beach, California suspension PVC plant in March 1982, Stauffer Chemical Company ranked [__] in 1982 nameplate and practical production capacity, with a market share by these respective measurements of [__] and [__] percent (see CX 318A–Q *in camera;* CX 662D-F *in camera*). Stauffer ranked [__] in

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[9] Viewed as a stand alone entity, Diamond's PVC Plant # 5 would have ranked as the [__] largest firm in the bulk and suspension PVC industry in both nameplate and practical production capacity. And Diamond's remaining Deer Park PVC operations would have ranked [__] in nameplate capacity with a market share of [__] percent and [__] in practical production capacity with a market share of [__] percent (CX 662D,F *in camera*).

1981 bulk and suspension PVC production, holding a market share of [—] percent (CX 661Z–28 *in camera;* CX 664T *in camera*).

46. At the time of the acquisition, General Tire & Rubber Company (renamed "GenCorp") ranked [—] in nameplate capacity with a market share of [—] percent, and [—] in practical production capacity with a market share of [—] percent (CX 662D,F *in camera*). The 1981 figures place GenCorp [—] in PVC production, with a market share of [—] percent (CX 661Z–28 *in camera;* CX 664I *in camera*).

47. Ethyl Corporation ("Ethyl") was the [—] ranking PVC producer measured by industry nameplate capacity with a market share of [—] percent prior to the acquisition (CX 662D *in camera*). Ethyl and Stauffer both ranked [—] in PVC practical production capacity for the same period, each accounting for [—] percent of the market (CX 662F *in camera*). In 1981, Ethyl ranked [—] in actual PVC production, with a market share of [—] percent (CX 661Z–28 *in camera*).

48. At the time of the acquisition, Pantasote accounted for less than [—] percent of PVC industry capacity (CX 662D,F *in camera*). During the year prior to the acquisition Pantasote ranked [—] in bulk and suspension PVC production with a market share of [—] percent (CX 661Z–28 *in camera;* CX 664S *in camera*).

As for Talleyrand, Great American Chemical Corporation and Keysor-Century Corporation, each accounted for less than [—] percent of the bulk and suspension PVC market in 1981 (CX 661Z–28 *in camera*). In September 1981, Talleyrand ceased production and exited the market (CX 319B). Great American and Keysor-Century individually accounted for less than [—] percent of 1982 bulk and suspension industry capacity (CX 662D,F *in camera*).

B. Concentration in the bulk and suspension PVC market

1. The effect of the acquisition on concentration

49. Goodrich's acquisition of Diamond Shamrock's Deer Park, Texas, suspension PVC Plant # 5 resulted in an increase in concentration in the bulk and suspension PVC market. Measured by the Herfindahl-Hirschman Index ("HHI"), nameplate capacity increased by 113 points to a level of 1,098, while the practical production HHI rose 112 points to a level of 1,079 (CPF 5.27–.28). [14]

50. By virtue of the acquisition, four-firm concentration in PVC nameplate capacity rose 4.0 percent to a level of 54.2 percent, rounded to the nearest decimal (CPF 5.27). Four-firm concentration in PVC practical production capacity also increased, rising 4.3 percent to a level of 53.5 percent (CPF 5.28).

51. As for eight-firm concentration figures, in nameplate capacity the acquisition increased concentration by 0.8 percent, to a level of

82.4 percent (CPF 5.27), while there was no change in the practical production capacity figure of 81.5 percent (CPF 5.28).

52. Goodrich's leading position in the PVC market was enhanced by virtue of the acquisition. Its share of PVC nameplate capacity increased from [__] percent to [__] percent, and its share of practical production capacity rose from [__] percent to [__] percent (CPF 5.27–.28).

53. Because actual production figures attributable to Plant # 5—apart from Diamond's overall output—could not be identified in the record, changes in concentration calculated on that basis were not included in the proposed findings. However, a comparison of 1981 and 1982 market shares in actual PVC production shows that Goodrich's market share increased from [__] percent to [__] percent, while Diamond Shamrock's share of industry production fell from [__] percent to [__] percent (CX 661Z–16 *in camera;* CX 664P,R *in camera*). Four-firm concentration also increased between 1981 and 1982, rising from [__] percent to [__] percent (CX 661Z–16 *in camera*).[10] And the Herfindahl Index rose 221 points to 1131 (CX 661Z–16 *in camera*).

2. Concentration trends

54. The record shows an overall increase in concentration in the bulk and suspension PVC market over the past several years. From 1977 to 1985, nameplate capacity HHI increased from 720 in 1977, to 1203 in 1985 (see table at CPF 5.69). In this period, eight-firm concentration also increased from [__] percent in 1977 to [__] percent in 1985. Four-firm concentration increased from [__] percent in 1977 to [__] percent in 1985, while the two-firm figures are [__] percent and [__] percent. Practical production capacity and actual production data reflect similar increases in concentration over the same time period (see CX 664M,N *in camera*). **[15]**

55. It appears that from 1970 to 1975, entries offset exits in the PVC business. Between 1974 and 1975, Georgia Pacific, Formosa, Certain-Teed and Shintech (a joint venture between Shin-Ebi of Japan and Robintech) began production of bulk and suspension PVC (CPF 5.69; CX 344B). [ ] (CX 321B *in camera;* CX 357A *in camera;* CX 359F; CPF 5.69). In addition, several PVC producers sold their manufacturing facilities to newcomers and exited the industry during this period (CX 442B-C). In 1970, Airco, Inc. sold its Chemical and Plastics Division to Air Products & Chemicals, Inc. (CX 323A). And in 1973, Allied Chemicals Corporation sold its polyvinyl chloride manufacturing facility to Robintech Incorporated (CX 325A). By 1975, there were

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[10] Two-firm concentration increased from [__] percent in 1981 to [__] percent in 1982; eight-firm figures are [__] percent in 1981 and [__] percent in 1982 (CX 661Z–16 *in camera*).

22 producers of bulk and suspension PVC, an increase from 19 in 1971 (CPF 5.69).

56. *De novo* entry has not occurred in PVC production since 1975. [ ] (CX 317C *in camera;* CX 307B *in camera;* CX 318A,D *in camera;* CX 300Z–6 *in camera;* see 306B *in camera*). [ ] (CX 326C *in camera*). [ ] (CX 326C *in camera*). [ ] (CX 319A,B; CX 326C *in camera*). [ ] (CX 317C *in camera*). [ ] (CX 41A, *in camera;* CX 53W *in camera*). [ ] (CX 307B *in camera*). The following year, Stauffer Chemical Company sold its Delaware City, Delaware PVC plant to Formosa Plastics Corporation. [ ] (CX 318A,D *in camera*). [ ] (CX 300Z–6 *in camera;* see CX 306B *in camera*). (see CX 116 *in camera;* CX 561 *in camera*).

57. Since 1975, several firms have shut down their facilities and left the PVC business. Union Carbide exited the PVC market in 1977, following a destructive explosion at its plant (CX 43B; CX 108Q). [ ] **[16]** (CX 322A,C *in camera*). Two years later, GenCorp and Pantasote, Inc. both closed their respective PVC plants and left the industry (CX 388; H. Wheeler 1720–21; see H. Wheeler 1774).

58. Since the Goodrich acquisition in January 1982, the number of firms engaged in the production of bulk and suspension PVC has declined from 17 to 11 (CPF 5.67).

VII. PVC QUALITATIVE ANALYSIS

A. Entry considerations

59. Complaint counsel's economic expert speaks of "entry conditions," rather than "entry barriers,"[11] describing these as "anything that exists in the industry" which will (1) delay entry in response to the existence of supracompetitive profits; (2) reduce the magnitude of the entry response; and (3) reduce the probability of entry (Kaserman 2311). In this connection, Dr. Kaserman identified "five basic factors" which ought to be considered (Kaserman 2314–15). Each is addressed, *infra.*

1. Minimum efficient scale plant

60. According to a number of industry witnesses, the minimum efficient scale for PVC manufacturing plants is in the 300–600 million pounds-per-year range. Mr. Disch of Tenneco estimated the minimum efficient scale to be at least 300 million pounds, but noted the presence of further scale economies in plants larger than that (Disch 644). Mr.

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[11] Apparently, there is agreement by the expert economists on both sides that there are no "Stigler type" entry barriers in the PVC industry (Kaserman 2828, 2831–32; Klass 4423). According to the testimony, a Stiglerian entry barrier is generally considered to be a production cost which must be borne by a company seeking to enter an industry, but not borne by an industry participant (Kaserman 2312, 2833; Klass 4424). For example, a Stiglerian barrier exists where incumbent firms have exclusive access to a particular productive raw material, or a prohibitive patent advantage (Kaserman 2832–33).

Schaefer, formerly of Diamond, testified that the minimum size was 300 million, with expansion potential to 500–600 million pounds (Schaefer 1132).[12] Goodrich believed that there were scale economies in a 550 million pounds-per-year facility beyond those inherent in a 300 million pound plant (DiLiddo 3345). The estimate of ICI's Dr. Eades was approximately 500 million pounds (Eades 1462–[17] 63). Mr. Howard Wheeler of GenCorp was of the opinion that the minimum efficient scale for a bulk or suspension PVC plant was 600 million pounds-per-year, but that 750 to 900 million pounds would be perferable (H. Wheeler 1734–35).

61. Apart from the above testimony, the record shows that in 1983 the Borden and Formosa companies each completed construction of new plants with nameplate capacities of [__] and [__] million pounds, respectively (CX 302G *in camera;* CX 308E). And the planned Goodrich suspension PVC facility at Convent, Louisiana was designed to have a [__] million pounds per year capacity (DiLiddo 3345; CX 38 *in camera*).

62. [ ] (CX 14F *in camera;* CX 515). Today there are a number of plants in the industry with a nameplate capacity larger than [__] million pounds: Georgia Gulf ([__] million pounds) (CX 301D *in camera*); Tenneco ([__] million pounds) (Disch 637); Formosa Plastics ([__] million pounds) (CX 308E); Shintech (two plants, with total capacity of [__] billion pounds) (compare CX 317B,C *in camera* and McMath 1892).

2. Sunk costs

63. Complaint counsel's economic expert, Dr. Kaserman, identified "sunk costs" as costs incurred upon entering an industry which cannot be retrieved upon leaving that industry (Kaserman 2321–22). In assessing the magnitude or significance of sunk costs in the PVC industry, it must be realized that bulk and suspension PVC plants are specialized, suitable only for the manufacture of PVC (Disch 686). There was testimony that it would be very difficult to convert a PVC plant to any other use, and that, in fact it might be easier to start afresh and build a new plant for such purpose (H. Wheeler 1724–25, 1744–45). Some industry witnesses placed sunk costs as being 75–80 percent of the total value of a PVC facility (H. Wheeler 1744–45; Schaefer 1219), with total costs for an efficient sized plant exceeding $100 million (Schaefer 1211–12; Diamond Adm. 450, CX 6S). There was testimony that the industry recognizes that investment in a new plant would entail considerable financial risk (DiLiddo 3134–3137),

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[12] In 1981, Diamond Shamrock, in response to an HSR request, estimated the minimum size to be 300 million (CX 445).

and that, should it be necessary to close a plant, virtually the entire investment could be lost (Liao 1521–22; see DiLiddo 3396).

3. Required lead time

64. There is record evidence that the time required for planning, permitting and constructing a bulk or suspension PVC plant may be as long as [—] to [—] years (CX 15A; CX 16B, Z–10 *in camera;* CX 182I *in camera;* CX 196A *in camera;* CX 439B; CX 446C; see Diamond Adm. 445, CX 6S). [18]

65. As for actual construction of the plant, the time needed is approximately two years (Schaefer 1134; McMath 1940; Disch 653; see also CX 446C).

66. Prior to beginning plant construction, however, it is necessary to obtain certain environmental permits (Schaefer 1133; CX 597; CX 642; CX 643; Diamond Adm. 443, CX 6S; Goodrich Adm. 400, CX 4Z–23).[13] Securing such permits is often a costly and time-consuming process (Diamond Adm. 415, CX 6Q), [ ] [19] (Schaefer 1133; CX 38V *in camera;* CX 506B *in camera;* CX 592 *in camera*).[14]

67. In addition, certain engineering work must be performed even before applying for regulatory permits, since the resulting information must be presented in the permit applications (DiLiddo 3337).

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[13] Air emissions from VCM and PVC plants are subject to the restrictions of the Clean Air Act, as amended, 42 U.S.C. 7401–7642. Both plants are subject to specific air-quality standards restricting vinyl chloride emissions in accordance with the National Emissions Standard for Vinyl Chloride, 40 CFR 61.60–.68, promulgated pursuant to the National Emission Standard for Hazardous Air Pollutants (NESHAP, 42 U.S.C. 7412). In addition, the Prevention of Significant Deterioration (PSD) regulations include vinyl chloride as a pollutant covered under the regulations, with a one ton per year emission rate as the triggering amount, 40 CFR 51.24(b)(23), 52.21(b)(23). New VCM and PVC plants, as well as major expansions of existing facilities, may otherwise be subject to federal PSD requirements as major potential sources of any of the other air pollutants subject to regulation under the Clean Air Act, including the need to obtain preconstruction permits, 42 U.S.C. 7470–7479; 40 CFR 51.24, 52.21. Federal PSD air emission requirements apply only to sources locating in areas presently meeting the National Ambient Air Quality Standards (NAAQS), 42 U.S.C. 7407(d), 7475. For new or existing sources locating or located in "nonattainment areas," a more stringent set of regulations applies. 42 U.S.C. 7501–7508; 40 CFR 52.24. See also 40 CFR Part 51, Appendix S ("Emission Offset Interpretative Ruling").

Effluent discharges from VCM and PVC resin plants are subject to the restrictions of the Clean Water Act, as amended by the Federal Water Pollution Control Act, 33 U.S.C. 1251–1376. Vinyl chloride has been specifically designated by the EPA as a toxic pollutant under the Act, 33 U.S.C. 1317; 40 CFR 401.15, and polyvinyl chloride manufacturing facilities have been identified as a category of pollutant discharge point sources, 33 U.S.C. 1316(B)(1)(A), see 40 CFR 401.12, 416.10–.15. New and existing VCM and PVC manufacturing facilities hence are subject to the permit requirements of the National Pollutant Discharge Elimination System (NPDES) program as potential sources of the discharge of pollutants, 33 U.S.C. 1342. In addition, VCM or PVC plants may also be subject to local regulations, particularly land use requirements.

[14] Such regulatory requirements were viewed by Goodrich as significantly affecting the total lead time for plant construction and the risk of new plant investment:

> Complicating the development and implementation of new processes is the long lead time required for plant expansions and constructing grass root PVC plants. This is now four to five years vs. the three years formerly required due to the increasing number of local and federal restrictions and necessary approvals. The result is R&D's time table to freeze a plant design is drastically shortened requiring front-end loading of programs and skilled prioritizing of the resources to get the job done in time to have a maximum impact. This is especially difficult with new technologies which usually require the building and operation of a pilot plant before design data for a manufacturing plant can be generated. By-passing stages in process development to meet the shorter time tables will significantly increase the risks of long costly plant start-ups and not meeting planned capacity goals.

(CX 196A *in camera;* see also CX 67Z–7 *in camera;* CX 183D *in camera*).

[ ] (DiLiddo 3337; CX 183D *in camera*). This pre-permit engineering, according to Goodrich, could take approximately six months (DiLiddo 3337). And in 1980, EPA amended its Prevention of Significant Deterioration Regulations to require that air quality near the site might have to be monitored for a period of time prior to applying for permits (40 CFR 51.24(m), 40 CFR 52.21(m)). This latter factor could add even additional time to the permit process (CX 446D; CX 574J; see also Kienholz 803–04).

68. Another factor to be considered prior to filing for permits, is selecting a site for a new facility. This, in itself, can be a "complicated" process (see DiLiddo 3335–36), involving *inter alia,* raw material and finished product logistics, community acceptance, labor supply, labor relations, political climate, and the availability of local support services (CX 574I,M-U; see also CX 193B; CX 643; CX 594A-B; RX 1061D-E; RX 1304; RX 1308). [20]

69. Furthermore, additional time may be needed for a new entrant to evaluate and obtain licenses for needed PVC manufacturing technology. There was testimony that this could take approximately one year (Disch 646–7; Schaefer 1133). And, since entry into the PVC industry is a major strategic decision involving substantial amounts of capital, a new entrant will more than likely have to conduct an extensive study and analysis of the market prior to making an entry decision (see CX 594A-B; CX 53A).

70. Recent entry experience evidences the length of entry lead time. Formosa Plastics began looking for a site for its PVC/VCM complex in the latter part of 1978 (Liao 1523–24). The facility "started running" in December of 1982, and did not "have full production" until the first quarter of 1983.[15]

71. Another record example is Goodrich's suspension PVC plant project at Convent, Louisiana. [ ] (DiLiddo 3335–37; CX 36S *in camera*). Prior to the July 1979 announcement, Goodrich had completed an extensive PVC/VCM strategy study over an eight-month period (DiLiddo 3334–35; CX 53A). During these eight months, Goodrich had also completed a complicated site selection process and had chosen the Convent, Louisiana site (DiLiddo 3335–36). The company was also planning to utilize its own in-house technology (DiLiddo 3336).

72. And again, in 1981, Diamond Shamrock projected the lead time for a new suspension PVC plant at Deer Park, Texas, using Diamond Shamrock technology, to be four to five years "from concept to start-up" (CX 439B).

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[15] This time period does not include any strategic analyses which might have been done prior to Formosa's search for a site. Furthermore, Formosa possessed or had access to production technology (Liao 1539), and had some experience in the industry by virtue of its participation in the Rico Chemicals project (Liao 1519–22).

4. Excess capacity

73. Capacity utilization rates in the bulk and suspension PVC industry over the 15-year period 1970–1984 are shown in the tables set forth at CPF 17.03.

74. The recent period of low capacity utilization, in 1980–1982, coincided with a time of economic recession in the United States. And there was testimony that a demand for PVC in **[21]** industry reflected this general state of economic activity (see DiLiddo 3116–18; Eades 1471–73).

75. Various industry witnesses generally viewed the recent period of low capacity utilization as being transitory, and that utilization rates will gradually increase throughout the 1980's (Disch 691–92; Schaefer 1123, 1125; Eades 1473–74, 1480; H. Wheeler 1736–37; CX 220C).

5. Extent of vertical integration

76. [ ] (CX 667 *in camera*), [ ] (CX 667I-J *in camera*).

77. The evidentiary record contains a chart, RX 246A which depicts the various patterns of ownership integration among the industry's producers as of 1984.

78. As evidenced by RX 246A, the pattern of integration among the producers varies:

(1) Goodrich, Formosa and Georgia Gulf are fully integrated by ownership into PVC and VCM, with manufacturing facilities at each of the six stages of the PVC production chain: (1) chlorine and/or ethylene; (2) EDC; (3) VCM; (4) bulk and/or suspension PVC; (5) PVC compounding; and (6) PVC fabricating.

(2) Borden and Conoco are almost fully integrated by ownership into PVC and VCM with manufacturing facilities at five of the six production stages. However, as depicted, Borden does not produce chlorine and/or ethylene and Conoco does not have a PVC fabricating facility.

(3) The seven remaining PVC producers—Air Products, CertainTeed, Keysor-Century, Occidental, Pantasote, Shintech and Tenneco—do not produce VCM. According to the chart, their degrees of downstream integration are varied. While Air Products and Shintech do not own PVC compounding or fabricating facilities, Tenneco owns a PVC compounding, but not a PVC fabricating facility, and CertainTeed, Keysor-Century, Occidental and Pantasote own both PVC compounding and fabricating facilities. **[22]**

(4) Finally, the three remaining VCM producers—Shell, PPG and

DOW—have no downstream integration into any phase of PVC production and their degrees of upstream integration vary.

6. Entry and expansion experience

79. [ ] (see Kaserman 2341–44; CX 664G *in camera*).[17]

80. [ ] (CX 664G *in camera;* RX 1182A; see CX 303H *in camera;* CX 310D *in camera;* CX 355A *in camera*).

81. Industry capacity further increased from 1976 to 1978 when a number of firms, including Air Products, Borden, CertainTeed, Formosa, Goodrich, Goodyear, Conoco, Diamond, Tenneco, and Shintech expanded their PVC businesses, generally adding large reactor capacity (see Klass 4074–75; RX 1182A).

82. (CX 15A; CX 164C *in camera;* see Disch 691–92; Schaefer 1122). During this period Formosa undertook construction of a grassroots PVC plant in Point Comfort, Texas, which commenced [23] actual operations in 1983 and has a production capacity of approximately 530 million pounds per year (Liao 1533–35; CX 308E). Similarly, during 1979, Georgia Pacific, Air Products, Goodrich, Tenneco and Imex expanded their PVC production capabilities, and one year later Diamond and Georgia Pacific incrementally increased their PVC production capabilities (RX 1182A).

83. Finally, there has been new plant construction by Borden and Formosa and expansions by Conoco, Shintech and Air Products as of 1983 and 1984 (McMath 1892; DiLiddo 3285; RX 687A; RX 820A; RX 1182A).

84. There was testimony that, at present, the PVC market is burdened with excess capacity and poor financial returns (Yu 2173–75; H. Wheeler 1736; DiLiddo 3282–84). [ ] (L. Wheeler 1031–32 *in camera;* Schaefer 1211–13; DiLiddo 3285–87; see CX 513C *in camera*).

B. PVC homogeneity

85. Bulk and suspension PVC resins are produced and sold in several grades, distinguished by differences in particle size, molecular weight, and purity (Disch 632, 634–35; Becker 1255–57). These grades are designed to meet particular applications and end-use requirements of purchasers (Disch 634; Diamond Adm. 166; CX 6H).

86. Within the various grades, there appears to be little variation

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[17] This assumes that the entry of Formosa Plastics is counted as of the date of its involvement in the Rico Chemical project, rather than from its acquisition of Stauffer's Delaware City facility, or construction of its own Point Comfort, Texas plant.

Formosa entered the PVC business in 1974 with the construction of its RICO plant in Puerto Rico. From 1974 through 1980 Formosa's sales never exceeded 3 percent of the market and in 1981 the RICO plant was closed (CX 664C). In that year, Formosa purchased a small PVC facility, with a nameplate capacity of 255 million pounds per year, from Stauffer Chemical, and in 1983 it completed construction of and commenced PVC production at a 530 million pound per year plant at Point Comfort, Texas (CX 664C; RX 303C).

in overall quality among PVC producers (Disch 725; RX 309Z-11), with "major PVC end use markets" being described as "not quality conscious" (RX 34S).[18]

87. [ ] (Disch 725; CX 406Z-6; *in camera*). Commodity grade resins were estimated by one industry witness to account for approximately 75 percent of bulk and suspension PVC sales (Weber 1795). There was testimony that commodity grade resins are by and large considered to be "me-too" products, with no real claims that one supplier's resin is better than another's (Disch 719, 725; see also Becker 1331). Thus, according to Tenneco's Mr. Disch, pipe customers will switch resin suppliers over small differences in price (Disch 707). And there was further **[24]** testimony that no supplier can maintain a premium price for its commodity grade over those of other suppliers (Becker 1264-65; Schaefer 1139, 1202-03).

88. [ ] (H. Wheeler 1750-51; Becker 1263-64; DiLiddo 3374-75; RX 152Z-6 *in camera*). As to these, some industry witnesses perceived certain differences in inherent physical properties (Disch 725; Becker 1331, 1333-34). While "specialty grades command a small premium over what is called the commodity rate" (H. Wheeler 1750-51), suppliers of these products are not able to maintain such premium over the prices of similar grade resins of competing producers (Becker 1264-65; H. Wheeler 1750-51).

89. Producers sometimes provide technical service in conjunction with the sale of PVC (Becker 1331-32). Such service is relatively more significant in the sale of specialty grades than commodity grades (Becker 1330-31; Weber 1794-96). In the specialty area, the providing of technical service could cause a customer to prefer to continue dealing with its regular supplier, and afford that supplier the opportunity to meet competitive offers (Becker 1330-32; Schaefer 1202-03). Nevertheless, for the bulk and suspension PVC market as a whole, service is considered relatively unimportant (Schaefer 1202-03; CX 199U).

90. [ ] (Eades 1461; CX 518F *in camera;* RX 34T; RX 54B *in camera*), where buyers will switch suppliers over small differences in prices (DiLiddo 3372). Purchasers of bulk and suspension PVC generally select the lowest price resin grade suitable for a particular processing or end-use requirement (Diamond Adm. 177; CX 6H).

91. Respondents urge, however, that the question of homogeneity in this case properly involves an analysis of what they term "commercial heterogeneity:" whether PVC resin is produced and sold on a uniform basis or according to varying terms and practices (Klass 4333-34). As to this, respondents assert that there are a number of material terms

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[18] There was testimony from one industry witness that "the same resins from different suppliers are not exactly the same" (H. Wheeler 1748; see also RX 175Z-2-5 *in camera*).

and conditions which distinguish ways in which PVC is sold and purchased (DiLiddo 3250, 3252–53; see Becker 1338; H. Wheeler 1768–69; McMath 1960; RX 577S).

92. [ ] (Disch 685–86; Schaefer 1134, 1203; Becker 1338; McMath 1960; DiLiddo 3250, 3252–53; RX 144A-B *in* [**25**] *camera;* RX 177A *in camera;* RX 212B *in camera;* RX 585R; RX 1240C *in camera*).[19]

93. [ ] (Disch 685–86; Becker 1330–32; DiLiddo 3252–53; RX 259B *in camera;* RX 554C; RX 887A *in camera;* RX 1213Q-W *in camera;* RX 1240C *in camera;* see RX 212B *in camera*).

C. Demand for bulk and suspension PVC is relatively inelastic

94. Complaint counsel's economic expert, Dr. Kaserman, testified that in performing his analysis of the elasticity of demand for bulk and suspension PVC, he attached significance to the fact that PVC is an "intermediate product" rather than a consumer good. Dr. Kaserman testified that the price elasticity of demand for an intermediate product is a function of three factors: (1) the ease of substitutability between the intermediate product and other inputs in the production of the final product; (2) the cost share of the intermediate product in the production of the final products; and (3) the price elasticity of demand for the final products produced from the intermediate product (Kaserman 2370–71).

1. There are no practical substitutes for PVC resin in the manufacture of finished PVC products

95. The record indicates that there are no substitutes for bulk and suspension PVC resin in the manufacture of finished PVC goods (Kaserman 2376–77). PVC resin is the primary raw material input in the fabrication process, providing the properties necessary to give the product its fundamental form (see H. Wheeler 1751–52; Disch 661–62). Moreover, producers of PVC finished products testified that PVC manufacturing equipment cannot easily or practically process other materials (Wheeler 1751–52; Disch 663).

2. The cost share of PVC resin in many finished PVC products is low

96. Bulk and suspension PVC resins account for only a small portion of the cost of PVC finished products. Value is added to PVC resin at various points in the manufacturing process, thereby [**26**] reducing the cost share of the PVC resin in the final product. Initially, PVC resins are compounded in order to impart certain desired properties

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[19] Contrast RX 267A *in camera* (60–day credit terms) with RX 895A *in camera* (45-day credit terms) and with RX 268A *in camera* (30–day credit terms).

to the product prior to its use in fabricating end products (Disch 655–56). Compounding involves infusing the resin with various additives, including heat and light stabilizers, impact modifiers, plasticizers, and pigments (Disch 656–57). The amount of value added at the compounding stage varies. Flexible compounds used in the manufacture of wire, cable, and flexible sheathing require the addition of plasticizers, and frequently contain no more than 50 to 70 percent resin by weight (Disch 658–59; DiLiddo 3377). On the other hand, rigid compounds used in the manufacture of bottles, pipes, and fittings, require expensive additives, and others contain as much as 80–95 percent resin by weight (Disch 659–60; Becker 1300). In addition, value is added to PVC compounds at the manufacturing stage through a number of production processes, including extrusion, calendering, blow-molding, injection molding, and compression molding (Disch 661 –62). Once again, the value added varies with each PVC product (see CPF 8.70; CPF 8.77; CPF 8.92; CPF 8.97; CPF 8.105; CPF 8.113; CPF 8.124). Finally, PVC resin accounts for a very small portion of the total installed cost of PVC products such as pipe, siding and windows (see CPF 8.70; CPF 8.92; CPF 8.113). As a result, Dr. Kaserman concluded that the low cost share of PVC resin in PVC consumer goods indicates that the demand for bulk and suspension PVC resin in significantly less elastic than the demand for the products themselves (see Kaserman 2373–75).

3. The price elasticity of bulk and suspension PVC finished products is low

97. Bulk and suspension PVC resin is used in the manufacture of hundreds of end-use products. [ ] (see Disch 663–80; Becker 1268–1325; H. Wheeler 1727–28, 1753; CX 591G-K *in camera;* see Commission physical exhibits 1–17).

98. The record indicates that two factors account for the general inelasticity of demand for PVC end products and the relatively low substitutability of products manufactured from other materials. First, the evidence establishes that many PVC products possess unique characteristics which make them highly desirable in a variety of end-use applications (Yu 2118–29; Becker 1274–79; DiLiddo 3348–50; Disch 672–77). Consequently, PVC finished products are often selected on the basis of their distinctive properties, and not on the basis of changes in price (Yu 2188–29; Becker 1274–79; DiLiddo 3348–50; Disch 672–77). And second, a number of PVC finished products offer substantial cost savings to purchasers, comparing favorably in price with products manufactured from other materials (CPF 8.126). **[27]**

4. PVC finished end products

a. Pipe and pipe fittings

99. The production of PVC pipe accounts for approximately [__] percent of the annual consumption of bulk and suspension PVC resin (Disch 663; see also RX 145L *in camera;* Commission physical exhibit 6). PVC pipe fittings, which are used in conjunction with PVC pipe (Becker 1323–24), account for an additional 3–4 percent of PVC resin consumption (Disch 663; see Commission physical exhibit 7). PVC pipe first gained commercial prominence in the late 1960's and early 1970's (Becker 1276–78). During the period 1966–1968, the PVC pipe segment consumed approximately 134 million pounds of bulk and suspension PVC (RX 3Z–14). By 1983, however, demand has grown to about [__] million pounds (RX 165E *in camera;* see generally CX 756Z–19).

100. The record establishes that PVC pipe possesses a number of characteristics that compare favorably with pipe products manufactured from traditional materials.[20] These distinctive properties include: low cost, light weight, long lengths, ease of joining, ease of installation, corrosion resistance, smooth interior walls, and excellent flow efficiency.[21] These factors are examined in some detail, as follows:

101. In many of the applications for which it is used, there is evidence that PVC pipe is more cost-effective than alternative pipe materials (CX 591H *in camera;* CX 247A,L *in camera;* RX 958A; see also Becker 1293–94). Comparing the cost of manufacture alone, the record reflects that alternative materials cost appreciably more to produce (CX 247A,L *in camera*).

102. In addition, PVC pipe possesses qualities which make it easier to handle and less costly to install than most other pipe products. Mr. Andrew Yu of J.M. Manufacturing Company, Inc. testified that PVC pipe is substantially lighter in weight than traditional pipe materials, weighing approximately 30 percent as much as concrete pipe and 25 percent as much as ductile iron [28] (Yu 2122–23). Mr. Yu further testified that the relatively light weight of PVC pipe facilitates installation by hand labor, enabling contractors to dispense with heavy equipment required to lay ductile iron or cement pipe (Yu 2123–24; DiLiddo 3347–48). Moreover, PVC pipe is manufactured in longer lengths than pipe made from traditional materials (Yu 2123–24; Wag-

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[20] Traditional pipe materials which compete with PVC pipe include: clay, asbestos cement, concrete, steel, ductile iron, copper, and aluminum (see *e.g.*, CX 244F; CX 49K).

[21] See generally CX 591H *in camera;* CX 247A, L *in camera;* RX 958A; Becker 1293–94 (PVC pipe is low in cost); Yu 2122–27, DiLiddo 3347–48; Waggoner 3632 (PVC pipe is lighter and less costly to install than most traditional pipe); Yu 2121–22; DiLiddo 3348–50; Becker 1274 (PVC pipe is resistant to corrosion from chemicals); Yu 2118–21; Becker 1276–78; Waggoner 3576 (PVC pipe has excellent flow properties).

goner 3632). As a result, PVC pipe requires fewer joints in the installation process, permitting workers to lay pipe more quickly (Yu 2125–27; Waggoner 3632). [ ] (Yu 2123–27; CX 247A *in camera*).[22]

103. In addition, PVC pipe is resistant to certain corrosive chemicals that affect other kinds of pipe. Acidic, alkaline or wet soils do not cause the external walls of PVC pipe to corrode (Yu 2121–22; DiLiddo 3348–50; Becker 1274). Similarly, PVC pipe is not susceptible to internal corrosion from sewage or other materials. Consequently, as industry witnesses testified, PVC pipe can last significantly longer than ductile iron or concrete pipe in certain end-use conditions (Yu 2121–22; DiLiddo 3348–50; Becker 1274).

104. Finally, PVC pipe reportedly has excellent flow properties. PVC pipe's generally smooth internal surface permits it to carry a greater volume of water than pipe manufactured from other materials (Yu 2188–21). For example, there was testimony that a 12-inch PVC pipe can carry as much water at a given pressure rating as a 14-inch ductile iron pipe (Yu 2118–21; Becker 1276–78). PVC's smooth interior surface reportedly also prevents the accumulation of deposits resulting from contact with water having a high mineral content (Yu 2118–21; Becker 1276–78). Traditional pipe materials, such as ductile iron, are described as to be susceptible to deposit build-up; a condition which reduces the effective diameter of the pipe, shortening its service life (Yu 2118–21; Becker 1276–78). **[29]**

105. However, there are certain characteristics of PVC pipe which make it unsuitable for a number of end-use applications. For example, PVC pipe lacks the requisite stiffness for use in above-ground irrigation systems (Yu 2154). Furthermore, its acceptability of PVC pipe has been questioned by building code and fire officials for use in drain, waste, and vent (DWV) and conduit applications because of a controversy over its behavior in a fire situation (see, *e.g.*, CX 45S; see Waggoner 3638). In addition, ductile iron pipe is considered superior to PVC pipe in municipal water pipe applications involving rocky or shifting soil conditions, or heavily traveled surfaces (Waggoner 3578–79). Finally, because PVC pipe is a relatively new product, potential purchasers are in no position to assess long-term performance properties (Yu 2121–22, 2131–33; DiLiddo 3350–51; Waggoner 3628–30, 3634–35). In this connection, there was testimony that pipe purchasers consider performance over time a significant factor in pipe selection

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[22] There is evidence that PVC pipe can offer a price advantage on total-installed costs—a factor identified as an important consideration for pipe purchasers (DiLiddo 3348). For example, this would permit PVC electrical conduit producers to set the price of their product close to the price established for metal conduits and still offer the customer value in the form of lower labor costs for installation (RX 4V,W *in camera*). Similarly, a 1983 pipe industry study by Tenneco noted that PVC pipe had an installation cost advantage of $.50–$1.00 per foot over metal pipe in C–900 applications, a fact which "benefited" PVC in large diameters as costs become more competitive (CX 566E; see also CX 247A *in camera*).

because many applications envision pipe to be operational for many decades (Yu 2122; Waggoner 3630).

106. According to the record, the following constitute the major applications for PVC pipe: (1) municipal water pipe; (2) rural water pipe; (3) water service and distribution pipe; (4) sewer pipe; (5) drain waste, and vent pipe (DWV); (6) irrigation pipe; (7) communications duct; and (8) technical conduit (see CX 756Z–20).

1. Municipal water pipe

107. Municipal water pipe transports water from reservoirs, lakes, or rivers to local treatment facilities, and thence into water mains for distribution throughout the community. This segment of the pipe market is classified as "pressure pipe application," in that the water is conveyed through the pipe under pressure. As might be expected, pressure pipe applications require higher performance standards, which in turn affect design and cost (Yu 2096–99). Pipe produced for pressure applications must be engineered to withstand high internal and external pressures and to provide assurance of safety and longevity upon installation (*ibid.*).

108. Municipal water pipe is manufactured in a wide range of diameters. Large diameter pipes are needed to convey water from the reservoir to the treatment center and main lines, while smaller sizes are used to distribute water throughout local subdivisions (Yu 2114–15, 2116–15). Municipal water mains thus vary in size from 4 inches to approximately 36 inches in diameter (Yu 2115; see also Waggoner 3579–80; RX 3Z–35). Usually however, PVC municipal water pipe is sold in diameters of 12 inches or less (Yu 2115; Becker 1278; Waggoner 3580; see CX 377A-F). As noted, the smaller diameters of PVC municipal water pipe are used principally in subdivisions and housing developments (Yu 2112- **[30]** 15). The record indicates that large diameter pressure pipe represents only a [__] percentage of total PVC pipe sales (see CX 387C *in camera;* RX 165E *in camera*).

109. The municipal water pipe segment consumed approximately [__] million pounds of bulk and suspension PVC resin in 1983, accounting for [__] percent of total annual PVC resin consumption (RX 165E *in camera*).

110. PVC municipal pipe is generally purchased by the contractor chosen to install the water system (Waggoner 3574; Yu 2112). Although the contractor usually proposes the pipe material that will be used in a particular project, he is limited in this respect by the specifications drafted by the project's engineer (Waggoner 3574–75, 3584–85; Yu 2107–12). These specifications set forth the requirements of the municipality, including pipe diameters, pipe classes, installation methods, and materials that may be used on the job (Waggoner 3586).

Written specifications may designate a particular pipe material, such as ductile iron or PVC, for the entire system (Waggoner 3626). On the other hand, the specifications may call for the use of more than a single type of pipe (Waggoner 3626). Normally, municipal pipe specifications can be expected to reflect careful consideration of a number of factors such as soil conditions, terrain, and depth of the trenches to be excavated (Waggoner 3585, 3623–26). Finally, the record also suggests that specifying engineers are inclined to favor particular pipe materials based upon personal preference and prior use experience (Yu 2132–33; Waggoner 3624, 3627–29, 3631; DiLiddo 3352–53; see also CX 756–Z23).

111. The materials most commonly used in the manufacture of municipal water pipe are ductile iron, reinforced (pre-stressed) concrete, asbestos cement, and PVC (Yu 2116–17; Waggoner 3626–27, 3645–46; Becker 1275). All of these materials have distinctive performance properties which govern their selection for a particular application (see Waggoner 3617–18; Yu 2131–32; Becker 1276–78; DiLiddo 3348–53). All of the characteristics associated with PVC pipe, including flow efficiency, corrosion resistance, light weight, ease of installation, and lower installation costs come into play in the selection process.

112. For example, there was testimony that PVC municipal water pipe has smooth internal walls which resist the accumulation of deposits over time, resulting in a constant, unimpeded delivery of the water supply (Yu 2118–21; Becker 1276–77; RX 3Z–37). Thus, PVC pipe may be preferable in localities where the water to be transported has a high mineral content (see Becker 1276–77). Nevertheless, Mr. Waggoner of Griffin Pipe Products testified that competing pipe producers have devised techniques to overcome the problem of deposits (Waggoner 3577–78). He explained that ductile iron pipe manufacturers have **[31]** developed and for many years have utilized a cement liner which effectively insulates the interior walls of the pipe from deposit build-up (Waggoner 3577–78). In his view, therefore, the mineral deposit problem has ceased to be a significant factor (Waggoner 3577–78).

113. There was testimony that PVC municipal water pipe does not corrode in acidic, alkaline or wet soils (Becker 1274, 1276; Yu 2121–22; DiLiddo 3348–50; RX 3Z–37). Consequently, PVC pipe can be viewed as preferable to ductile iron or steel pipe in areas where soil conditions are conducive to such external corrosion (see Yu 2121–22).

114. Finally, PVC pipe was lauded in the record as frequently easier and less expensive to install than other municipal water pipe materials (Yu 2122–27; RX 3Z–36, 37). PVC pipe's light weight permits the use of hand labor in installation, thus dispensing with the necessity

for using heavy equipment (Yu 2123–24; see also RX 3Z–36–37; DiLiddo 3347).[23] In addition, PVC pipe is manufactured in longer lengths, thereby requiring fewer joints (Yu 2124–27; Waggoner 3632). And there was testimony that the processes used to join PVC pipe, *viz.*, bell joints and solvents, are superior to traditional procedures in that they are simpler and easier to execute (Yu 2126–27; Waggoner 3632; see also CX 377B). Moreover, PVC pipe can reportedly be cut more easily in the field than traditional pipe materials such as concrete or ductile iron (Yu 2126–27). However, it should be noted that the extent of any installation cost savings will vary according to the particular projects, depending upon the depth of the trench, soil conditions, and other factors (Yu 2112–14). For example, the installation of PVC pipe requires a special gravel backfill to insulate the pipe from the pressure of shifting or rocky soil (Waggoner 3578–79). According to Mr. Waggoner, the added cost of this requirement would offset the cost advantage that might otherwise obtain in installing PVC pipe (Waggoner 3651–53).

115. On the down side, it must be said that PVC pipe is less strong than other traditional pipe materials (see Waggoner 3575, 3628–29). As a result, pipe materials such as ductile iron are preferred for use in conditions which can induce breakage such as shifting or rocky soils (see Waggoner 3631). Similarly, PVC pipe would not be favored for segments of water pipeline to be placed under highly traveled roads or railroad crossings (Waggoner 3625). **[32]**

116. Moreover, PVC municipal water pipe's lack of performance history is generally perceived as a negative factor in the selection process (Yu 2122; see Waggoner 3628–30, 3634–35). PVC pipe is a relative newcomer in the municipal water pipe market, and thus lacks an established track record (Yu 2131–32; Waggoner 3626–27). The traditional pipe materials all have substantial performance histories, a factor favoring them over PVC in the selection process (Yu 2131–33; Becker 1280; DiLiddo 3352–53; see Waggoner 3624, 3629, 3634–35).[24]

Prior to 1975, PVC pipe had not received the approval of the American Waterworks Association ("AWWA"), the standard setting body looked to by municipalities in designating pipe products for water systems (CX 756Z–23; RX 3Z–37). There was evidence indicating that AWWA approval in 1975, as well as advances in technology permitting the manufacture of PVC pipe in increasingly larger diameters, facilitated market acceptance (Becker 1276; RX 3Z–37). Nevertheless, the absence of performance history has continued to affect sales of PVC for municipal use (Yu 2122; see Waggoner 3628–30, 3634–35).

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[23] But see Waggoner 3633–34 (saving in installation cost is not significant because heavy equipment is usually already present on the job site).

[24] Mr. Waggoner of Griffin Pipe Products testified that there are ductile iron pipe systems in place, which are still functioning 70 years after installation (Waggoner 3630). He explicated that such performance history is important in major metropolitan areas, because pipe repairs involve traffic disruption (Waggoner 3630–31).

Mr. Yu of J.M. Manufacturing Company, Inc., contended that PVC pipe will endure for up to 50 years or more in alkaline or acidic soil conditions. He estimated that ductile iron pipe and concrete pipe last 20 to 25 years and 30 to 40 years respectively under similar soil conditions (Yu 2122).

117. On balance, the evidence supports the following conclusions regarding competing alternative products in the municipal water pipe market: (1) PVC municipal water pipe has a significant cost advantage over alternative materials in the smaller diameter segments; (2) PVC pipe's cost advantage diminishes as pipe diameters increase and, (3) upon an appreciable rise in PVC resin prices, short term substitution can be expected to occur in larger diameter sizes.

118. The evidence indicates that PVC municipal water pipe has a significant cost advantage in the smaller diameters used in the municipal water pipe market (Waggoner 3580, 3635–36). As noted, PVC water pipe is sold principally for subdivisions and housing developments; applications which utilize smaller diameter pipe (Waggoner 3635–36, CX 539B). Mr. Waggoner described the [33] price advantage of PVC pipe over ductile iron[25] pipe with respect to a range of pipe diameters:

> Q. Would it be fair to say that PVC pipe has a selling price advantage over ductile iron pipe in the water main usage market.
>
> A. Yes.
>
> Q. In your experience what, in what diameter sizes would PVC pipe have the selling price advantage?
>
> A. Most times we find that in three, four and six inch, they have significant advantage, in eight inch, in most cases they have an advantage, and in ten inch and 12 inch they have an occasional advantage.

(Waggoner 3635–36, 3580).[26] Mr. Waggoner also testified that neither pre-stressed concrete pipe nor asbestos cement pipe are cost competitive with PVC pipe in the smaller diameters in which [34] PVC pipe is sold (Waggoner 3626–27, 3645). Concrete pipe is more commonly used in larger pipe diameters (RX 3Z–36). At the same time, the demand for asbestos cement has declined because of concerns relating to the carcinogenicity of asbestos (see Waggoner 3626–27; see also CX 756Z–34).

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[25] In addition, the record reflects that ductile iron pipe producers will adjust their prices below "normal" levels in order to be cost-competitive with PVC. Mr. Waggoner of Griffin testified that if "[O]ur marketing intelligence tells us that if the specification is written, that we will be competing against PVC pipe, that will be in a competitive price situation so that we automatically know that our price must come in to be competitive, which would be probably lower than it normally would be" (Waggoner 3582–83). Mr. Waggoner further testified that ductile iron manufacturers have developed a thinner wall pipe, class 50 pipe, in order to meet cost competition from PVC (Waggoner 3614–15). Mr. Waggoner explained that reducing the iron content in ductile iron pipe enhances the product's cost competitiveness (Waggoner 3614).

[26] Overall, however, ductile iron continues to be the dominant in-place material in the municipal water pipe market, with an estimated 60 percent share of total footage installed (CX 539B). An internal memo prepared by Griffin Pipe Products for the fiscal year 1984 specifically notes that "substitute materials continue to capture a significant portion of the small diameter pipe market that accompanies subdivision development" and names PVC pipe as the chief competitor to ductile iron in 3–inch to 12–inch diameter pipe applications (CX 539B). An internal memo prepared by Griffin Pipe Products for the fiscal year 1984 specifically notes that "substitute materials continue to capture a significant portion of the small diameter PVC pipe as the chief competitor to ductile iron in 3 inch to 12 inch diameter pipe applications (CX 539B).

119. [ ] (CX 566D; CX 522B *in camera*). [ ] (see CX 387C *in camera;* RX 165E *in camera*).

120. [ ] (see RX 233A *in camera;* RX 234B-C *in camera;* RX 573O; RX 687A). [ ] (Schaefer 1141–42; L. Wheeler 988; see also Disch 686) to the upper 30's to low 40's (in cents per pound) (Schaefer 1141–42; L. Wheeler 988; McMath 1927; RX 255A *in camera;* RX 226A *in camera*). During this period, PVC pipe producers complained that as resin prices reached higher levels, they lost sales to substitute products (Schaefer 1142, 1210; DeLiddo 3264–65; RX 236E). [ ] (Liao 1543–44; RX 234B-C *in camera;* RX 236E *in camera*).

At the same time, there was testimony that the 1984 price increases did not affect any non-pipe applications (see Disch 688–89) and that such increases were perceived by PVC resin producers as "unusual" (see, *e.g.,* Liao 1543–44; Disch 689). [ ] (see Liao 1543–44; see also Weber 1828; RX 234B-C *in camera;* Disch 689; L. Wheeler 988–89).

2. Rural water pipe

121. The rural water pipe category includes pipe used in water wells and Farmers' Home Administration (FMHA) projects (RX 3Z–40. See also CX 756Z–21–22). PVC pipe is the principal material used in FMHA projects (CX 756Z–21, 22; RX 3Z–41. See CX 378A-F). [ ] (RX 165E *in camera*).

122. The evidence indicates that PVC pipe has achieved dominance in the rural water pipe segment because its distinctive properties are uniquely suited to the requirements of rural **[35]** applications. Specifically, rural areas require transportation of water over long distances at low pressure (Waggoner 3622).[27] PVC pipe is fabricated at a low pressure rating and in relatively long lengths, permitting miles of pipe to be laid in rural areas with fewer connecting joints (Waggoner 3622). Similarly, PVC pipe's light weight and ease of joining facilitate installation by hand labor, offering contractors a cost advantage (see Yu 2134, 2112–17). In addition, rural water systems can utilize pipe which has a lower safety factor relative to the break resistance characteristics of the pipe (see Yu 2099–100, 2133–34). Lower safety requirements are permitted in rural areas because replacement of broken or damaged pipe involves minimal disruption or inconve-

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[27] Griffin Pipe's Mr. Waggoner testified that pipe pressure requirements are dependent upon the number of users to be served in a given location. Thus, municipal applications are generally better markets for ductile iron because ductile iron is manufactured at a high pressure rating and is marketed in shorter lengths than PVC pipe (Waggoner 3622).

nience to the rural population (see Yu 2099–100, 2133–34). Consequently, the vast majority (up to 85 percent) of PVC water pressure pipe sold on a footage basis is utilized in rural water applications (see Waggoner 3620–21; CX 756Z–20). Asbestos cement pipe is presently used for some of the large diameter needs, but industry sources expect that it will be displaced by PVC pipe within the next several years (RX 3Z–41).

3. Water services and distribution pipe

123. Service pipe conveys the water supply from the water main into the homes and buildings of users, while distribution pipe carries water from the water meter to taps and other individual outlets (RX 3Z–37). Both of these segments are pressure pipe applications (CX 756Z–20). Significantly, however, pipe used in service and distribution is smaller in diameter than pipe used in other water applications (RX 3Z–38). Distribution pipe diameters, for example, range from one-half to one inch for single family residential dwellings, to somewhat larger sizes used in multifamily or commercial buildings (RX 3Z–38).
(RX 165E *in camera*).

124. Copper is the leading pipe material used in both water service and distribution applications (Becker 1272–74; RX 3Z–38, 39; CX 756Z –26). Steel was formerly a significant factor in these applications, but it has generally now been displaced by other materials (RX 3Z–38). Steel pipe exhibited a number of undesirable characteristics which precipitated the shift to copper pipe, including a tendency to corrode and accumulate **[36]** deposits (RX 3Z–38). In addition, steel pipe is heavier than alternative pipe materials, and entails a cumbersome joining procedure (RX 3Z–38).

125. PVC pipe is currently enjoying major growth in the service pipe market (RX 3Z–37–40; CX 756Z–26, 27). An industry sponsored study reported that among plastics, "PVC is the material of choice because of its strength and low cost" in service pipe applications (RX 3Z–39). Until recently, however, PVC's penetration of the service and distribution pipe markets was hampered by a lack of building code approval (RX 3Z–39). In 1975, only 5 percent of the codes permitted plastic cold water distribution, and virtually none allowed use in hot water systems (RX 3Z–39). By 1980, however, 50 percent of the codes approved plastic use in both areas (RX 3ZX–39). Nevertheless, as a practical matter, PVC distribution pipe is not used for hot water pressure pipe applications because of heat distortion problems in the material (Becker 1272–73; CX 756Z–26).

126. There is evidence that PVC pipe offers a cost advantage over alternative materials used in the water distribution segment of the pipe market. For example, a 1983 Goodrich document estimated the

manufacturing cost per foot for two inch diameter pipe in the years 1976–1982 to be as follows: [ ](CX 247L *in camera*). Moreover, [ ] (see CX 247L *in camera;* CX 756Z–29, 31).

4. Sewer and drain pipe

127. The sewer and drain pipe segment includes sanitary sewers, storm sewers, and drainage applications (RX 3Z–44; CX 756Z–24). This market segment is divided into three categories; pressure sewer pipe, which accounts for just over 8 percent of the industry; gravity sewers, which account for 86 percent of the industry; and drainage which accounts for the remaining 5 percent of the industry (CX 756Z–24). [ ] (RX 165E *in camera*). **[37]**

128. The principal materials used in the fabrication of pipe for this application include: concrete, clay, corrugated iron and PVC (Yu 2141; Waggoner 3645–46). Although asbestos cement was formerly an important factor in the market, it has declined significantly in recent years (Waggoner 3645). Similarly, the sewer and drain pipe segment consumes a relatively small amount of ductile iron pipe, although ductile iron is used almost exclusively in the pressure pipe applications of this market (CX 756Z–25).

129. Once again, the record suggests that the distinctive properties of PVC have contributed to its increasing acceptance by this segment. Unlike concrete and asbestos cement, PVC pipe is resistant to internal corrosion from hydrogen sulfide gas (RX 3Z–48). And like PVC municipal pipe, PVC sewer and drain pipe is not susceptible to external corrosion from acidic or alkaline soil conditions (Yu 2142). [ ] (Yu 2142–44; RX 3Z–49; CX 300Z–7 *in camera*). At the same time, however, PVC's penetration of this market has been hindered by the reluctance of local officials to approve plastic materials, and by the general inclination of engineers to specify materials with a proven track record (CX 756Z–24, 25; see Yu 2146–48). In addition, PVC pipe is not manufactured in all of the diameters used in sewer and drain applications (CX 756Z–24, 25).

130. On the whole, however, the evidence indicates that PVC pipe has increased its share of the sewer and drain segment at the expense of traditional materials. Clay pipe, formerly the dominant material in gravity sewer applications, has declined in volume as a result of replacement by PVC (Waggoner 3646; CX 756Z–24). [ ] (CX 3Z–48 *in camera;* Waggoner 3646), and provides advantages over clay pipe in terms of lighter weight, installation costs, integrity of joints, and breakage resistance (Yu 2142–44; Waggoner 3646). [ ] (see CX 579F,M,S *in camera*). [ ] (see CX 579F,M,S *in camera*). Indeed, one 1980 PVC pipe cost comparison study predicted that clay pipe might disappear from the market altogether: [ ] **[38]**

[ ] (CX 579R *in camera*). Mr. Waggoner of Griffin Pipe Products attributed the decline in clay directly to PVC pipe's superior cost and performance advantages noting, "PVC came along and had a better joint system and it was cost competitive if not better than clay so usage of clay began diminishing as PVC started taking that market [sewer applications] away from it" (Waggoner 3646).

131. Approximately 86 percent of sewer and drain applications are non-pressure (CX 756Z–25). PVC pipe can be fabricated with thin walls for non-pressure applications (Yu 2137–39; Waggoner 3643–44). As a result, the cost of PVC sewer pipe is even less than the cost of PVC municipal water pipe (Yu 2105–06, 2140–41). A PVC industry witness placed the cost of a pipe 8" in diameter at $3.90 for PVC water pipe (Klass 150), and at $1.82 for PVC sewer pipe (Yu 2106, 2140–41). On the other hand, ductile iron producers sell the same pipe product for both pressure and non-pressure applications (Waggoner 3579, 3644). Consequently, ductile iron pipe, which is already at a cost disadvantage to PVC pipe in the municipal water pipe segment, experiences an even greater disadvantage in gravity sewer applications (Waggoner 3583).

132. Similarly, concrete pipe does not compete successfully with PVC pipe in the sewer and drain pipe segment. Although it has good crush resistance, concrete pipe is suceptible to hydrogen sulfide attack (RX 3Z–48). In addition, concrete pipe presents difficulties in sealing joints, which results in excessive exfiltration when used in sanitary sewers (RX 3Z–48). And due to its heavier weight, concrete pipe is more costly to install than PVC pipe in small diameters (RX 3Z–48, 50). As a result, concrete pipe tends to be used mainly in very large diameter storm sewer and drainage applications, and accordingly does not compete directly with PVC pipe in most sewer and drain end-uses (RX 3Z–48).

5. Drain, waste and vent (DWV) pipe

133. Drain, waste, and vent (DWV) systems form the interior network of pipe and fittings used for sanitary and waste removal (RX 3Z–52; CX 756Z–25, 26; Waggoner 3637). DWV applications utilize two interconnecting pipe systems—one for waste removal and the other to vent the system to the atmosphere (RX 3Z–52). The drain, waste and vent segment is not classified as a pressure pipe application (CX 756Z–20; Waggoner 3639). Pipe diameters used by DWV systems generally range in size from one half inch to eight inches (see, *e.g.*, CX 379). [ ] (RX 165E *in camera*). **[39]**

134. Cast iron and copper are the traditional materials used in the DWV segment (RX 3Z–54; Becker 1292; Waggoner 3637–38). However, copper has declined because of market penetration by more

economical plastics systems (RX 3Z–54). Acrylonitrile butadiene styrene (ABS) and PVC are the dominant plastics utilized in drain, waste, and vent applications (RX 3Z–54, 55; Becker 1292; Waggoner 3637–38).

135. The record reflects that PVC pipe has eroded cast iron's share of the DWV market because PVC offers substantial savings in both the cost of the pipe and the cost of installation (RX 3Z–54, 55; CX 756Z–25, 26). PVC's growth, however, has been impeded by two concerns. First, cast iron provides lower noise conductivity—an attribute that is particularly important in multi-family dwellings (RX 3Z–54). And second, a number of fire codes prohibit installation of PVC pipe because of the emission of toxic fumes upon combustion (Waggoner 3638). As a result, use of PVC pipe is frequently banned in highrise structures (see Waggoner 3637–39; RX 3Z–54, 55; CX 756Z–35). Nevertheless, PVC pipe has gained increasing acceptance for use in single family dwellings, and industry forecasts anticipate that because of its cost savings, PVC will continue to displace traditional materials to the extent permitted by code requirements (RX 3Z–55; CX 756Z–26).

136. PVC pipe has largely replaced ABS as the leading plastic pipe used in DWV applications (Weber 1806–09; CX 583Z–80; CX 756Z–26). Until 1973, ABS was the dominant plastic material in the DWV segment due to earlier code acceptance and the superior properties of ABS compounds (CX 583Z–80; RX 3Z–55). PVC producers ultimately developed an improved PVC compound offering performance properties similar to ABS at a substantially lower cost (CX 583Z–80; CX 756Z–26; Weber 1806–09). Although ABS pipe manufacturers have produced a foam core product to cut costs, PVC pipe still enjoys a considerable cost advantage (CX 756Z–26).

137. The evidence indicates, therefore, that PVC pipe maintains a significant cost advantage over both ABS and cast iron pipe in DWV applications. Goodrich estimated the manufacturing costs for three inch pipe produced from each of the foregoing materials to be as follows: [ ] (CX 247L *in camera*) **[40]**

6. Irrigation pipe

138. The irrigation pipe segment is classified as a pressure pipe application (Yu 2099–100; CX 756Z–20; see, *e.g.*, CX's 378A-F, 381A-D). However, pressure ratings for irrigation pipe are lower than those required for other pressure applications, permitting use of a thinner PVC pipe (Yu 2049–100, 2150–52). Irrigation systems are divided into three main categories: below-ground systems, above-ground systems, and on-the-ground systems (see Yu 2148–50). Below ground systems are further divisible into sprinkler systems and drip pipe systems (CX 756Z–23, 24; RX 3Z–68). [ ] (RX 165E *in camera*).

139. PVC and aluminum are the principal materials used in the irrigation pipe segment (Yu 2153; CX 756Z–24). Selection of either material is governed chiefly by the distinctive properties of the pipe product and the particular requirements of the irrigation system (Yu 2153). For example, PVC pipe is used predominantly in below-ground irrigation systems (CX 756Z–24). Unlike aluminum pipe, PVC pipe has superior impact resistance and will not crush when installed (Yu 2154). In addition, PVC pipe enjoys a substantial cost advantage over aluminum pipe (Becker 1290; CX 756Z–24). Thus, PVC is currently the leading material in below-ground sprinkler systems (CX 756Z–24).

140. On the other hand, PVC pipe is generally considered inappropriate for use in above-ground sprinkler systems (Yu 2152–54). PVC pipe lacks the requisite stiffness to ensure against breakage when the pipe is transported across a field (Yu 2153–54). Moreover, PVC resins must be formulated with special additives to protect the pipe from ultraviolet degradation (CX 756Z–24). Even with the inclusion of additives, PVC pipe is still available at lower cost than aluminum pipe prompting one forecasting report to predict that rapid price increases for aluminum could cause a shift to PVC (CX 756Z–24).

141. For many of the foregoing reasons, aluminum is the leading material used in on-the-ground irrigation systems [41] (Yu 2154; CX 756Z–24).[28] [ ] (CX 756Z–24; Becker 1289–90; CX 300Z–7 *in camera*).

7. Communications duct

142. Communications duct (or conduit) is used to protect telephone cable and wire running to and from telephone company facilities (Becker 1296; CX 756Z–27). Communications duct is classified as a non-pressure application (CX 756Z–20). Nearly all communications conduit is installed underground and is therefore manufactured from non-corrosive materials including: concrete, clay, bituminous fiber, asbestos cement, PVC and polyethylene (RX 3Z–59). [ ] (RX 165E *in camera*).

143. PVC gained the dominant position in the communications conduit segment largely because of its low price and ease of installation (RX 3Z–59). Until the mid-1960's, concrete and clay dominated communications duct applications (RX 3Z–59). PVC duct has replaced these materials because it offers a cost advantage and because its particular physical properties facilitate cable insertion (RX 3Z–59).

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[28] Ductile iron and asbestos cement pipe are not competitive in irrigation applications because the key characteristics of those materials, strength and high pressure ratings, are simply not needed (see CX 756Z–23, 24; RX 3Z–68; Waggoner 3642). As a result, ductile iron is at an overwhelming cost disadvantage compared to other materials (Waggoner 3642).

A small amount of polyethylene pipe is currently used in below-ground drip pipe systems (CX 756Z–24). A 1982 B.F. [ ] (RX 145Z–1 *in camera*). [ ] (RX 145Z–1 *in camera*).

Similarly, PVC has displaced bituminous fiber and asbestos due largely to its significant cost advantage over both materials (RX 3Z–59). At least one forecasting study has predicted that polyethylene duct (PE) will capture a growing percentage of the communications duct market (RX 3Z–59). Like PVC, polyethylene duct is lightweight and offers economies in installation (RX 3Z–59). At present, however, the evidence indicates that PVC duct remains the leading material in the communications duct segment (RX 3Z–59; CX 756Z–27). **[42]**

8. Electrical conduit

144. Electrical conduit is used in industrial and commercial structures as a protection for bundled wires (CX 756Z–27). Most electrical conduit is used above ground, although an increasing percentage of conduit is being buried in a manner similar to communications duct (CX 756Z–27; RX 3Z–60). [ ] (CX 300Z–7 *in camera;* CX 756Z–27–28). [ ] (RX 165E *in camera*).

145. Steel is the chief material used in above-ground electrical conduit, due largely to its superior strength (CX 756Z–28; RX 3Z–60, 61). [ ] (CX 756Z–28; RX 3Z–60, 61; see also CX 300Z–8 *in camera*). In addition, steel can be galvanized and coated with PVC in order to resist corrosion (RX 3Z–61). One industry study estimated that steel conduit accounted for over 72 percent of the electrical conduit market in 1980 (CX 756Z–28).

146. PVC, on the other hand, is used principally in underground applications (CX 756Z–28; RX 3Z–61). [ ] (RX 3Z–62; CX 756Z–28; CX 300Z–7, 8 *in camera*). Moreover, plastic conduit can be encased in concrete without being attacked by chemicals, and has smooth bores which promote easy wire insertion (RX 3Z–61). On the downside, PVC electrical conduit lacks the strength of steel and requires the use of a ground wire (CX 756Z–28). In addition, the controversy surrounding the toxicity of smoke from burning PVC pipe has caused PVC conduit to be banned by fire and building codes in many areas (CX 756Z–28).

b. Wire and cable applications

147. [ ] (Disch 663; see also CX 428Z–100; CX 126C; RX 145L *in camera*). PVC is used primarily as insulation and protective jacketing around copper and aluminum conductors (Disch 674; Becker 1269–70; 1303). [ ] (CX 591I *in camera;* see Commission physical exhibits 9 and 12).

148. Bulk and suspension PVC coatings for wire and cable have been established industry standard since World War II (CX 454). PVC displaced rubber, the traditional material in the wire and cable segment, because PVC was deemed to be flame resistant (Disch 676), to

have good weathering capabilities, excellent insulation properties, and flexibility, thus providing [43] an assurance of longevity and good performance (Disch 674–76; Becker 1270; DiLiddo 3108). As a result, the U.S. Government used the entire output of PVC during World War II for the coating of wire in naval ships (Di Liddo 3107).

149. [ ] (CX 45Z *in camera;* Becker 1269–70). [ ] (CX 126P-Q *in camera;* Becker 1269).

150. Industry forecasts are not unanimous in their performance predictions for PVC (see CX 126C; CX 45). At least one study characterizes the wire and cable industry as a "mature market" for PVC, noting that consumption should parallel—but not exceed—total industry growth (CX 126C).[29] This study further predicts that PVC will lose its share of some market segments to materials with better cost/performance characteristics (CX 126C). The forecast identifies nylon jacketing in building wire and fluoropolymer insulation in commercial plenum areas as potential competing materials (CX 126C). Nevertheless, the study also notes that PVC holds a strong position in the rapidly growing electrical segment which should enable it to recoup its lost share on a total industry basis (CX 126C).

On the other hand, another industry forecast prepared by Arthur D. Little predicts that "in wire and cable applications PVC will continue to be preferred because of its ease of handling and also cost versus other materials" (CX 45H). [ ] (CX 300Z–8 *in camera;* Disch 675–76), but PVC is generally viewed as having superior properties (Disch 676; CX 126C).

151. Industry witnesses testified that consumption of bulk and suspension PVC resin in wire and cable applications is not sensitive to fluctuations in the price of PVC resin (Disch 675; Becker 1305). Mr. Giles Disch, Vice President and General Manager of Tenneco Polymers, Inc., attributed this "insensitivity" to fluctuations in price to PVC's unique performance properties (Disch 675). In addition, many alternative materials lack building code acceptance (CX 45Z), a primary criterion in meeting the governing standard or [44] specification for most applications (CX 126Z–1). The ability to meet the governing specification is of central concern in the wire and cable industry (CX 126Z–1).[30] A B.F. Goodrich internal report states, however, that "price considerations come heavily into play" once a competitive material has satisfied the governing specification (CX 126Z–1). This report goes on to add that "competitive material pricing is considered a minimum standard" in the wire and cable industry (CX 126Z–1).

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[29] This study, prepared by B.F. Goodrich personnel, divides the wire and cable industry into six segments: telephone, electrical, power, building wire, automotive, and apparatus (CX 126A-D).

[30] Mr. Disch's testimony alluded to the lengthy testing and review process required to certify alternative materials and suggested that this factor has discouraged shifts away from PVC products in the face of fluctuating resin prices (Disch 675).

Complaint counsel contend that the cost share of PVC resin as a factor in finished wire and cable products is small (CPF 8.77). They assert that the cost of PVC resin alone as a percentage of the cost of wire and cable compound is no more than 30–50 percent depending upon the specification for the particular wire or cable compound (CPF 8.77). Testimony provided at trial does not confirm that the cost share of PVC resin in the finished product is "low," or that this share is precisely "no more than 30 percent to 50 percent" (Becker 1306–07).[31]

c. *Packaging film and sheet*

152. [ ] (see CX 591J-K *in camera;* CX 581A *in camera;* CX 428Z–100; see also **[45]** Disch 663; RX 206A *in camera*). [ ] (CX 581A-D *in camera;* CX 45P; CX 591K *in camera*) [ ] (CX 581A-D *in camera;* CX 45P; see also CX 428Z–75, 76; CX 444D). PVC is also used in "blister packs;" vacuum-formed rigid PVC film used to package products such as hardware, toys, and stationery (Becker 1321–25; CX 428Z–76; CX 444D), [ ] (CX 581H-J *in camera;* RX 145Z–30 *in camera*). [ ] (CX 45H; RX 145Z–29 *in camera*), [ ] (Disch 679; Becker 1308; McMath 1936; CX 581B *in camera;* CX 45H; RX 145Z–29 *in camera*). The foregoing characteristics combine to ensure the freshness of the product and to enhance the product's physical appeal (Becker 1308, 1310–11; McMath 1936; Disch 679). [ ] (CX 581B *in camera;* CX 45H; CX 92V; CX 300Z–9 *in camera;* RX 145Z–29 *in camera*). PVC is also preferred to other materials for use in blister packs of non-food items because of its clarity, strength, and tear-resistant characteristics, and because it is relatively easy to vacuum form (Becker 1322–24; McMath 1921).

153. [ ] (CX 300Z–9 *in camera*). [ ] (RX 145Z–29 *in camera*). [**[46]**][32] (Becker 1310–11; Disch 680; McMath 1936; CX 300Z–29 *in camera;* RX 39F).

There was testimony at trial that the demand for bulk and suspension resin in the consumer wrap segment is relatively insensitive to fluctuations in PVC resin price (Becker 1309; Disch 680). PVC's unique characteristics, which are described in the foregoing paragraphs, have made it the preferred material in the consumer wrap applications (Disch 680; Becker 1309). Significantly too, PVC is well entrenched in the consumer wrap market because packaging fabrication equipment has been developed based on PVC (CX 444D).

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[31] When asked by complaint counsel if the cost share of PVC resin in wire products would be 30 percent or 50 percent, the witness, Mr. Becker, a former Sales and Marketing Manager of Diamond Shamrock responded:

> THE WITNESS; Thirty to fifty percent, somewhere in those kind of ranges.
>
> I can't for the life of me imagine what value the answer to that question is because without looking at something specific and comparing prices of all the materials at some point in time, it is difficult to make any kind of definitive statement.
>
> It is not certainly at the 100 percent level, we can say that. For some applications it may be only a third. For other applications it could be more than that (Becker 1306–07).

[32] [ ] (RX 145Z–30 *in camera*). The last category, medical packaging, is discussed at a later point in these findings (see Findings 189, *infra*). [ ] (RX 145Z–30 *in camera*). [ ] (RX 145Z–29, 30 *in camera*). [ ] (RX 145Z–30, 31 *in camera*). [ ] (RX 145Z–30 *in camera*). [ ] (RX 145Z–29 *in camera*). [ ] (RX 145Z–29 *in camera*).

d. Siding

154. The vinyl siding and accessories market utilize approximately 300 million pounds of bulk and suspension PVC resin annually, accounting for about 5 percent of PVC consumption (Belt 2065; see also Disch 664). Vinyl siding consists of extruded panels of compounded PVC resin used as exterior sheeting that is installed over the existing walls of a building (Belt 1986–87). Vinyl siding accessories, which are typically sold in conjunction with vinyl siding, include extruded products used to install the vinyl siding such as trim, corner posts, soffits and fascia board (Belt 2000–01; see Commission physical exhibit 14). [**[47]**][33] which consumes between [ ] and [ ] of all vinyl siding produced (Belt 2002; CX 590B *in camera*). The remaining 5 percent to 10 percent of vinyl siding is sold into the new construction market, which includes both site-built and manufactured homes (Belt 2002).

155. Vinyl siding possesses several key properties which have contributed to its increasing popularity. It is lightweight and pliable, making it easy to install. At the same time, vinyl siding does not have to be painted, is relatively maintenance-free, and is long lasting (Belt 2010–11). Vinyl siding also offers high impact resistance. [ ] (Belt 2010–11, 1987–88; CX 300Z–8 *in camera;* CX 45H).

156. The principal alternative siding products used in the remodeling market are wood, aluminum, and steel. An industry study prepared by CertainTeed Corporation allocated market shares in the residing segment in 1981 as follows: vinyl, [ ]; wood, [ ]; aluminum, [ ]; steel, [ ]; and other materials, [ ] (CX 590F *in camera*). [ ] (CX 590I *in camera*).[34]

157. According to the record, the characteristics of vinyl siding compare favorably to aluminum. [ ] (CX 300Z–8 *in camera*). [ ] (CX 300Z–8 *in camera*). [ ] (CX 300Z–8 *in camera*). Nevertheless, aluminum compares favorably with vinyl siding in at least two important respects. **[48]** [ ] (CX 300Z–8 *in camera;* CX 590H *in camera*). [ ] (CX 300Z–8 *in camera*).

158. Similarly, vinyl siding compares favorably with wood siding in a number of respects, [ ] (CX 300Z–8 *in camera*). Unlike wood siding, [ ] (Becker 1299; CX 300Z–8 *in camera*). On the other

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[33] Traditional materials such as aluminum, wood, and masonry account for the bulk of the *new* construction market. An industry study prepared by the Pipe and Plastics Group of CertainTeed Corporation [ ] (CX 590F *in camera*).

[34] In contrast, the new construction market [ ] (CX 590C *in camera*). [ ] (CX 590D *in camera*).

hand, wood siding offers several important advantages that influence its selection over vinyl siding. [ ] (CX 300Z–8 *in camera*).

159. Finally, vinyl has generally replaced steel in the remodeling segment because vinyl is lighter and easier to install (Belt 2011–12). [ ] (Belt 2011–12; CX 590D *in camera*).

160. At the same time, [ ] (Belt 2011; CX 300Z–8 *in camera*). Indeed, vinyl siding enjoys a substantial price advantage over both aluminum and steel siding. Mr. John Belt, Jr., President of the Vinyl Building Products Division of CertainTeed Corporation, one of the largest vinyl siding producers in the United States, testified that at the distributor level,[35] vinyl siding is less expensive than aluminum siding by a [ ] (Belt 2017–18 *in camera;* see also CX 588A-B).

161. [ ] (CX 590I *in camera*). [ ] (CX 590I *in camera*). One industry report estimated that "aluminum siding costs are currently [ ] above vinyl" and "energy costs **[49]** about [ ] that required for vinyl" (CX 590K *in camera*). [ ] (Becker 1299–3000; Belt 2014, 2020; CX 590G, K *in camera;* see also RX 70C *in camera;* RX 90G *in camera*).[36]

162. In addition, Mr. Belt of CertainTeed testified that the prices of alternative siding materials were not presently considered in setting the price of vinyl siding. In response to a question on this point, [ ] (Belt 2024–25, 1984 *in camera*). [ ] (Belt 2024–25, 1984 *in camera*). [ ] (Belt 2025 *in* **[50]** *camera*).

163. Moreover, the evidence suggests that the cost of PVC resin is only a very small portion of the total price of the installed siding product to the homeowner. To convert PVC resin to siding, the resin is blended with a variety of additives and ingredients, such as titanium dioxide, impact modifiers, heat stabilizers, lubricants, and waxes, to form a compound (Belt 1995; Becker 1300–01). [ ] (Belt 1995–96; RX 90Z–80 *in camera*). At this juncture, the cost of PVC resin on the average accounts for approximately [ ] of the selling price of a square of vinyl siding to the distributor (see Belt 2026–27 *in camera;* CX 756Z–59). Mr. Belt testified that the current average selling price of a white vinyl siding square[37] to the distributor

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[35] Siding products in the remodeling market move through two distribution channels. [ ] (Belt 2007–08; CX 590C *in camera*). The distribution chain also consists of sales from the manufacturer to chain home centers or lumber yards and then to professional home remodelers or do-it-yourselfers (Belt 2007–08).

[36] Documentary evidence cited by respondents indicates that vinyl siding producers are engaged in research and development activities designed to enhance the competitive edge vinyl already holds over aluminum. [ ] (Belt 2012–13; CX 582J *in camera;* RX 84J *in camera;* RX 94A; RX 109H *in camera;* RX 158Z–19 *in camera;* RX 169I *in camera;* RX 91A *in camera*). In addition, [ ] (see RX 109H *in camera;* RX 158Z–19 *in camera;* RX 185X-Y). As a whole, respondents' evidence suggests [ ] (RX 68D *in camera*). For example, respondents cite an internal memorandum which evaluates the competitive position of plastics as follows: [ ] (RX 91D *in camera*).

[37] Vinyl siding is sold in units called "squares," referring to the fact that one unit equals 100 square feet (Belt 1995, 2004).

level ranges from [to] (Belt 2017–28 *in camera*, 1998; CX 756Z–59). Mr. Belt further testified that if the vinyl siding is installed by a home improvement contractor, the final installed price will include additional labor costs running from [to] (Belt 2040–41 *in camera*). Finally, market research studies conducted by CertainTeed indicate that the average installed price for vinyl siding is about [ ] with such variable factors as the contractor's margin and other costs beyond materials (Belt 2041 *in camera*).

164. The evidence also indicates that an increase in the price of bulk and suspension PVC resin of [ ] across the industry would not affect the demand for vinyl siding (Belt 2039 *in camera*). Mr. Belt testified as follows regarding the impact of a permanent PVC resin price increase of [ ]:

> [I]f it happened through the industry, you know, we went through a period where I think the high and the low on resin was something like [ ] and [ ] and I didn't see anything except siding prices coming down slowly through this entire period.
>
> So there are other factors that I think are much more important than the cost of resin.
>
> Q. And given what you have just said, do you have an opinion as to what would happen to the volume of overall industry-wide volume of vinyl siding sales should a [ ] PVC resin price increase be instituted? **[51]**
>
> A. Well, my projections, my business projections have increased and we are still projecting the [ ] increase on siding that frankly would have been projected had we seen the reverse true in terms of the trend on PVC resin.
>
> We are in an industry that operates probably at [ ] of capacity and we are in a high growth area and we have many people adding more lines, more sophisticated lines, higher output lines and adding still more capacity. [ ] (Belt 2039–40 *in camera*).

e. Floor tile

165. Approximately [ ] of suspension PVC resin is consumed annually in the production of vinyl floor tiles (see RX 145Z–51 *in camera;* RX 90Z–73 *in camera;* CX 591I *in camera;* CX 45P; see also Disch 672). [ ] (CX 300Z–9 *in camera;* CX 450; see Commission physical exhibit 8).

166. Most floor tile is made of vinyl, although a small amount of asphalt tile is still produced (Disch 673; CX 450). [ ] (Disch 673; CX 300Z–9 *in camera*). [ ] (RX 51C *in camera*).

167. Nevertheless, price is not the central factor influencing the demand for a particular material as a floor covering. [ ] (CX 450P; CX 756Z–76; RX 51C *in camera*). [ ] (CX 450P; CX 756Z–76; RX 51C *in camera*). [ ] (Disch 673; RX 145Z–49 *in camera;* CX 300Z–9 *in camera*). A 1982 study noted that resilient flooring, the segment in which vinyl flooring is contained, "fared worse than the total floor covering market" during the years 1975–1980 (CX 756Z–

73). The study attributed resilient flooring's poor performance to an increase in the use of carpeting during the years studied, as well as several other factors (CX 756Z–73). The study further noted that while competition from carpeting had affected the growth of [52] resilient flooring, vinyl still held an advantage over carpeting for use in kitchens, bathrooms, and other hard-use areas in the home (CX 756Z–76).

168. The record indicates that the price of PVC resin is but a small component of the cost of a finished vinyl floor tile. Mr. Disch of Tenneco Polymers testified that PVC resin accounts for approximately 15–20 percent of the physical composition of a vinyl floor tile, with the remainder consisting of fillers, calcium carbonate, and other ingredients (Disch 672). The value of the tile product is also enhanced through various decorative processes such as coloring, embossing, and engraving, increasing the value of the tile relative to the cost of the resin (Disch 672–73). Thus, as Mr. Disch explained: "[t]he price of the resin going into the tile is about 40 cents a pound. It is 15 percent, 20 percent, you are talking 6 to 8 cents of resin within a volume of tile" (Disch 673).

f. Bottles

169. According to complaint counsel, approximately 100 million pounds of PVC resin were used in the manufacture of bottles in 1981 (CX 158A). Complaint counsel contends that this figure represents roughly [ ] of domestic PVC consumption (see Disch 664; RX 145L *in camera*). About [ ] of the PVC bottle applications involve general purpose non-food uses for products such as shampoo, dishwashing soap, charcoal lighter fluid, powdered laundry detergent and window cleaner (CX 158A-B; CX 92X; RX 145Z–35 *in camera*). The remaining 25 percent of the PVC bottle segment involves food-contact applications and includes containers for products such as cooking oil, vinegar, and mouthwash (CX 158A-B).

170. Demand for PVC fabricated bottles in general purpose, non-food applications is influenced by PVC's distinctive product characteristics. These properties include: transparency, impact resistance, light weight, chemical and oil resistance, low oxygen and carbon dioxide permeability, low moisture absorption, high melt strength, and ease of adaptation to conventional bottle manufacturing equipment (Becker 1317; CX 92X).

171. Similarly, utilization of PVC products in the food contact segment is also a function of PVC's particular performance properties. [ ] (Becker 1318; CX 157U *in camera*). [ ] (Becker 1318; CX 157U *in camera*).

However, regulatory prohibitions against PVC's use in food contact applications are the most significant factors affecting demand for this PVC product (see CX 158A; CX 581K-L). The Bureau of Alcohol, Tobacco, and Firearms ("BATF") banned PVC **[53]** as a liquor packaging material in 1975 due to concerns about vinyl chloride migration (CX 158A).[38] For the same reason, the Food and Drug Administration ("FDA") has proposed a ban on PVC in all food contact applications (CX 158A). [ ] (see H. Wheeler 1732–33; CX 158A; CX 581K-L *in camera;* CX 157J *in camera*), [ ] (RX 145Z–35 *in camera;* CX 581K *in camera*). In addition, negative public opinion generated in response to regulatory activity concerning the use of PVC in food-contact bottles is considered likely to continue to affect demand for some time (CX 45Q-R).

172. The principal alternative materials used in bottle applications are glass, high density polyethylene ("HDPE") and polyethylene terephalate ("PET").

173. HDPE accounted for over [ ] of all plastic material used in the manufacture of bottles in [ ] (CX 157F *in camera*). HDPE is used predominantly in one gallon milk containers which comprise the single largest use for plastic bottles of any kind, with over [ ] sold in [ ] (CX 157F *in camera*). [ ] (CX 157U *in camera*). Nevertheless, HDPE has two key drawbacks. [ ] (CX 157U *in camera*). **[54]** [ ] (CX 157U *in camera*). [ ] (CX 157U *in camera*).

174. [ ] (CX 157F *in camera*). [ ] (CX 157U *in camera*), and notes that [ ] (CX 157F *in camera*). Indeed, the Goodrich study also notes that PET's largest market, [ ] (CX 157F *in camera*). Significantly, PET has a number of advantages that compare favorably with PVC. First, [ ] (CX 157B *in camera;* CX 158C *in camera*). In addition, [ ] (CX 157U *in camera*). [ ] (CX 157B *in camera*). Finally, [ ] (CX 157B *in camera;* CX 157U *in camera*). On the other hand, [ ] (CX 158C; CX 157U *in camera*). [ ] (CX 158C *in camera;* CX 157V *in camera*).

175. Documentary evidence also indicates that despite vigorous dis-

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[38] B.F. Goodrich withdrew from the production of bulk and suspension resin for bottle applications in the wake of the BATF ban on PVC use in liquor packaging in 1975 (CX 158A). Thus, by 1982, a B.F. Goodrich internal memorandum declared that "For all practical purposes, BFG is a non-entity in the domestic PVC bottle industry" (CX 158F). The memorandum also noted that in 1982, Goodrich had only one current customer for resin for bottle applications (CX 158F). Nevertheless, the memorandum projected an improved climate for PVC in the food-contact bottle segment and advocated a return to production of bottle grade resin (CX 158I-J). Significantly, the memorandum noted that Goodrich was at a disadvantage in three key areas: technology, marketing, and manufacture, and it therefore concluded that Goodrich would need to make a major commitment in terms of personnel, time, and money in order to become competitive (CX 158G, I-J). At the same time, the memorandum identified Ethyl and Hooker as the leading producers of bottle grade resin in 1982 (CX 158D). As a result, it is difficult to determine, in the absence of further evidence, what role Goodrich currently plays in the production of bottle grade resin and whether the acquisition of Diamond Shamrock has enhanced its competitive position.

counting by glass bottle producers, plastic bottles continue to erode market share (RX 288N-O). As one market research study notes:

> Glass manufacturers acted too late and too slowly to prevent plastic bottles from becoming entrenched in a number of markets. The subsequent slow discounting actually helped plastics manufacturers in the long run by forcing them to make newer, more efficient equipment, cut bottle weight tremendously and improve resin production technologies. The bottom line was that plastics had to keep on their toes to stay competitive and this is helping them increase market share today (RX 2880).

176. This study goes on to add that plastic products have displaced glass for use in both the kitchen and the bathroom because of plastic's shatter-proof properties (RX 2880). The study further notes that supermarkets and distributors feel that [55] plastic bottles are easier to handle and that the whole process will cost them less than facilities for handling glass returns (RX 288N-O).

177. Mr. Becker, formerly Sales and Marketing Manager of the Plastics Division of Diamond Shamrock, testified that the demand for PVC resin in bottle applications is generally insensitive to fluctuations in the price of PVC resin (Becker 1319). Mr. Becker noted that PVC had "found very specific market niches in the bottle trade" and that "within reason" there wasn't a great deal of sensitivity to normal shifts in resin prices (Becker 1319). However, Mr. Becker further testified that if resin prices move from an "insensitive range" of between $0.15 to $0.35 to a range between $0.75 to $1.00, customers would switch to alternative products (Becker 1319–20).

178. In addition, Mr. Becker indicated that the cost share of PVC resin in the price of the bottle compound might be "somewhere between 30 percent and 50 percent" (Becker 1319). He testified that PVC bottle manufacturers often requested additional quantities of key ingredients such as impact modifiers, thereby reducing the cost share of PVC resin in the final product (see Becker 1319).

g. Windows

179. Approximately [ ] was consumed in the manufacture of vinyl windows for the replacement market in [ ] (RX 145Z–23 *in camera*).

180. Vinyl replacement windows first entered the market in the late 1970's. Since that time, their use has increased rapidly, attaining [ ] of the remodeling market in [ ] (see Belt 1977, 2052; CX 92Y; RX 90G *in camera;* RX 145Z–23 *in camera*). A 1982 PVC Growth Study prepared by Goodrich estimated that the vinyl window segment of the replacement market would grow at an annual rate of about

[ ] of the replacement market from [through] (RX 145Z–23 *in camera*). The Study further predicted that this growth would amount to [ ] from [ ] through [ ] (RX 145Z–23 *in camera*).

181. Mr. Belt of CertainTeed Corporation attributed the rapid growth in demand for vinyl replacement windows to the superior insulation properties provided by vinyl windows (Belt 2047–48). Mr. Belt noted that windows can be the greatest source of heat loss in a home, next to the attic (Belt 2047), and in his view, heightened energy-consciousness has created a strong demand for vinyl replacement windows to improve thermal efficiency (Belt 2047, 2051–52).

182. [ ] (CX 300Z–8 *in camera*). Aluminum is **[56]** the dominant material in the remodeling segment (CX 756Z–107), followed by wood and vinyl in second and third position (CX 756Z–107). [ ] (CX 300Z–8 *in camera*). [ ] (Belt 2062 *in camera;* CX 300Z–8 *in camera;* RX 145Z–23 *in camera*).

183. [ ] (see RX 90G, Z–60 *in camera*), [ ] (Belt 2062 *in camera;* CX 756Z–118). [ ] (Belt 2062 *in camera;* CX 756Z–118). Nevertheless, [ ] (Belt 2062 *in camera*).

184. [ ] (see Belt 2057–61 *in camera;* CX 756Z–118; RX 90Z–80 *in camera*). For example, PVC resin represents about [ ][39] to the fabricator of a vinyl window system (Belt 2058 *in camera*). The lineals are then assembled by the fabricator, with the glass and accompanying hardware, into a finished window. [ ] (Belt 2059–60 *in camera*). Thus, according to complaint counsel, if PVC resin were selling at [ ] the value of the PVC resin content in a finished window would be less than [ ]. Mr. Belt estimated that the price for a vinyl window sold by a fabricator to the home improvement contractor and then to the homeowner could range from [ ] to [ ] (Belt 2059–61 *in camera;* CX 756Z–118). Mr. Belt further testified that, in his view, an increase in resin prices across the board of 5 percent or even 10 percent would have "no impact" on the demand for vinyl replacement windows (Belt 2062–63).

h. Records

185. According to complaint counsel, phonograph records account for roughly 2–3 percent of bulk and suspension PVC resin consumption (CPF 8.115). Phonograph records are produced by the **[57]** compression molding of PVC suspension resin (Disch 678, see Commission physical exhibit 13).

186. [ ] (Disch 678; CX 300Z–10 *in camera*). [ ] (Disch 678; CX 300Z–10 *in camera*).

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[39] Vinyl lineals constitute the four to five sash and frame members that are used in making a finished vinyl replacement window (Belt 2046–51).

187. A limited amount of polystyrene has been used in the production of low priced children's records (Disch 678; CX 45Z–4). However, compared to PVC, polystyrene is brittle and breaks easily (Disch 678). Thus, it has never been considered a significant factor in the phonograph record market (Disch 678–79; CX 45Z–4).

188. Finally, Mr. Disch of Tenneco Polymers testified that as many as three records can be produced from one pound of PVC resin, making the cost share of the resin a small portion of the cost of the finished processed phonograph record (Disch 678). Mr. Disch further testified that, in his view, changes in the price of PVC resin would have no affect on the demand for PVC fabricated phonograph records (Disch 679).

i. Medical applications

189. Medical applications consumed approximately [ ] pounds of bulk and suspension resin in [ ] (RX 145Z–32 *in camera*), and are projected to attain a volume of over [ ] pounds by [ ] (RX 206A *in camera*). [ ] (RX 145Z–30, 31 *in camera;* Disch 767–77; Becker 1309–12; see Commission physical exhibits 10 and 11). A study conducted by Goodrich in 1982 noted that PVC "has virtually eliminated glass and other materials from these applications (blood and IV bags), and that [ ] (RX 145Z–30 *in camera*). In the same vein, the study noted that PVC's flexibility and clarity in thick cross sections make it [ ] (RX 145Z–31 *in camera*). Moreover, PVC has secured FDA approval for use in medical applications (Disch 676). Thus, Mr. Disch testified that the demand for PVC products in medical applications is insensitive to fluctuations in the price of PVC resin because of the particular need for the properties supplied by PVC products (Disch 677). **[58]**

j. Calendered products

190. A variety of rigid and flexible calendered products[40] account for the remaining PVC resin consumption (see CX 45W-Y, Z–2–4; CX 428Z–100; RX 1325Z–65–86; Disch 663). Rigid calendered PVC sheet is used to manufacture decorative laminates and credit card stock (H. Wheeler 1728, 1753; RX 1325Z–85, 86). Applications for flexible calendered PVC sheet include: wall coverings (both commercial and residential); upholstery; automotive interiors and landau tops; apparel such as footwear, raincoats, and shower caps; household items such as shower curtains and tablecloths; and various consumer goods such as wallets and luggage (H. Wheeler 1727–28; Becker 1313–14; DiLiddo

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[40] A calendered product is manufactured by a process known as "calendering," in which large heated rolls are used to produce wide sheets of PVC materials, which are later turned into a finished product (Becker 1312–13; DiLiddo 3376–77).

3375–79; CX 45W-Y, Z-22; see Commission physical exhibits 16 and 17). PVC resin is used in the manufacture of these diverse end-use segments because, with the addition of compound additives and ingredients, it can be made flexible or rigid, strong, tear resistant, and it is easy to fabricate and color (Becker 1313–14; DiLiddo 3376–77; see also Disch 665). Moreover, Mr. Howard Wheeler of GenCorp testified that the demand for calendered products is influenced primarily by the general state of the economy, and tends to be more responsive to movement in the GNP than to fluctuations in the price of PVC resin (H. Wheeler 1754).

191. Alternative materials are available to the consumer in each of the applications in which PVC calendered products are used. Complaint counsel suggests that the central factor affecting demand for PVC calendered products is the individual taste and preference of the purchaser (CPF 8.123). Thus, complaint counsel argues that although wallpaper is less expensive than vinyl wall coverings, vinyl wall coverings may be preferred by purchasers because of vinyl's washability and durability (CPF 8.123). Documentary evidence indicates that the primary factors affecting the use of vinyl coated fabrics in furniture applications are the general health of the furniture industry and fashion trends or fads (CX 45W). In furniture applications, vinyl fabrics are used in low priced residential furniture and office, institutional and industrial markets (CX 45W). Although vinyl coated fabrics still dominate "business" applications, one study noted (CX 45W):

> The only area where vinyl coated fabrics face major competition is in consumer use. In this area new synthetic fibers have taken a good share of the market. The major competitive materials are polypropylene, polyester and nylon. A survey shows **[59]** that of all upholstered furniture purchased in 1975, 41% were upholstered with Herculon polypropylene, 20% with nylon and 17% with vinyl coated fabric. We do not expect PVC to be replaced in such applications as dinette sets, outdoor furniture, etc. The all plastic polypropylene or other molded furniture does not compete directly with vinyl coated fabrics. We do not believe that even though there have been advances in ultraviolet stability of the polyolefin that they can compete in outdoor furniture with the vinyls.

192. The use of vinyl coated fabrics in automotive applications is generally perceived to be a function of customer preference rather than price. Mr. Becker, former Sales and Marketing Manager for Diamond Shamrock, testified that customers prefer fabric upholstery in automobiles to vinyl coated fabrics because vinyl retains heat in the summer and cold in the winter (Becker 1267–68). In the same vein, Mr. Becker observed that "PVC in a car top is obviously nothing more than an aesthetic basis, nothing else could be used that would be very close to PVC in cost" (Becker 1314).

193. Moreover, complaint counsel contends that the cost share of

PVC resin as a percentage of the price of a finished calendered good is "generally insignificant as a result of the addition of compounding ingredients to give PVC the properties required in the specific end use, and the fabrication and finishing processes that occur after the resin is compounded" (CPF 8.124). Accordingly, Dr. DiLiddo testified that a typical shower curtain could have as much as 25 parts of plasticizer in it per 100 parts of PVC resin (DiLiddo 3377–78). Thus, in a shower curtain weighing approximately two pounds, approximately one-half pound would be plasticizer and one and one-half pounds would be PVC resin by composition (DiLiddo 3377–78). In theory, therefore, if PVC resin were selling at a price of $0.30 per pound, the shower curtain could contain $0.45 worth of PVC resin (CPF 8.124). Complaint counsel contends that the disparity between the possible retail price for a finished vinyl shower curtain and the cost of its PVC resin content is illustrated by Commission physical exhibit 16, a vinyl shower curtain which retails for $7.99 (DiLiddo 3378). Similarly, if resin is selling at $0.30 per pound, a vinyl shower cap weighing four ounces might contain three ounces of PVC resin resulting in less than $0.08 worth of PVC resin in a vinyl shower cap retailing at $1.79 (DiLiddo 3379; see Commission physical exhibit 17).

D. Similarity of PVC raw material and production costs

194. There are two broad categories of costs associated with the production of bulk and suspension PVC: (1) the cost of the VCM feedstock; and (2) the cost of converting this into the PVC product. These are considered in reverse order: [**60**]

1. Production costs

195. The record shows that the technology needed for the manufacture of PVC is widely available to all producers; there being no patents of significance to impede this activity (Eades 1499–1500; H. Wheeler 1773; Kaserman 2406, 2409; DiLiddo 3288–89; Klass 4425–26).

196. The amount of VCM consumed in the production, for example, of a pound of PVC is the same or similar for all producers. Mr. Disch of Tenneco placed this as "slightly more than a pound" of VCM for a "modern plant," there being a small loss of VCM in the manufacturing process (Disch 643).

197. There was testimony that current manufacturing technology is approaching its limits in the use of VCM without waste. Raw materials efficiency was believed by Goodrich witness DiLiddo to be nearly 100 percent (DiLiddo 3395).

198. The reason for such production efficiency was attributed to the increasing use of the larger reactors (Disch 643; DiLiddo 3395). In the

United States, this equipment arrived on the scene in the early 1970's, and presently accounts, in the estimation of Mr. Disch, for "about two-thirds of the installed capacity" (Disch 641).[41]

199. There was also testimony from industry witnesses that manufacturing costs to producers for converting VCM into PVC using large reactors was similar (Disch 645; Schaefer 1149).

200. [ ] (see CX 246A-Z-44 *in camera;* RX 35Z-10, 67-70 *in camera;* RX 172L *in camera;* RX 184B-E *in camera;* RX 245A-Y *in camera;* RX 667S *in camera;* RX 715A; RX 1168A-B *in camera;* DiLiddo 3224-26). These estimates do indicate variances in manufacturing costs among PVC producers.

201. In the view of complaint counsel, however, such evidence fails to explain how producers can have access to **[61]** similar technology and similar raw materials and still not have similar production costs.[42]

2. Raw material costs

202. [ ] (H. Wheeler 1746; RX 22A; RX 29B *in camera; cf.* RX 1204A *in camera*). As to vertically integrated producers, Goodrich's Dr. DiLiddo testified that "different levels of integration, either forward or backward could impact their cost position or cost functions" (DiLiddo 3217). And respondents point to studies by industry participants reflecting the existence of raw material cost differences.[43]

203. Complaint counsel's response to this evidence is that it is an error to rely upon it to establish the cost of VCM to integrated PVC producers. Thus, it is urged, the appropriate value to assign to an integrated firm's transference of VCM is the firm's "opportunity costs," *viz.*, "the value of the product in the next best alternative use" (complaint counsel's brief at 35). Under this reasoning, the appropriate value of VCM for an integrated firm is the amount the firm could sell it for if it **[62]** did not use it internally. Accordingly, since all firms "pay" market prices, all pay similar amounts for their VCM (complaint counsel's brief at 36).

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[41] Complaint counsel calculates that the total industry nameplate capacity accounted for by large reactors is 84 percent (CPF 9.08).

[42] [ ] RX 172L *in camera* and RX 35Z-67, 68 *in camera* in attributing lower costs to plants to the extent that they have been depreciated (complaint counsel's reply brief, p. 62).

Complaint counsel also claims that respondents have failed to show that any PVC plants have a "locational" advantage over others, *viz.*, lower shipment costs, based upon the relative distances that incoming VCM and outgoing PVC resins might have to be transported. In their view, locational differences tend to "cancel out," in that, *e.g.*, a producer on the Gulf Coast, incurring less transportation costs for incoming VCM than competing plants in the Northeast or Midwest, would nevertheless have to pay more in shipping outgoing PVC resin than his counterparts to service customers in those areas (*id.* at 64).

In addition, complaint counsel belittles respondents' contentions based upon the cheaper production of "commodity" resins in large reactors, as opposed to the higher cost of producing "specialty" resins in smaller reactors. It is sufficient, in their view, that costs for producing each of these grades remain similar (*id.* at 63-64).

[43] See L. Wheeler 1030-31 and RX 877D, *in camera*.

E. The availability of price information in the PVC market

204. As noted in the *Guidelines*, "[c]ollusive agreements are more likely to persist if participating firms can quickly detect and retaliate against deviations from the agreed prices or other conditions. Such deviations are easiest to detect, and therefore less likely to occur, in markets where detailed information about specific transactions or individual price or output levels is readily available to competitors" (*Guidelines* at 3.42).

205. Respondents maintain that reliable price information concerning sales of PVC resins is not readily available to competing producers, thus lessening the susceptibility of this market to price collusion.

206. In this connection, there is certain evidence lending support to respondents' position, as follows:

207. The record shows instances where PVC producers would not be fully cognizant of the selling prices of their own resin until after the product had been shipped, delivered and possibly even consumed. [ ] (Disch 710–12; McMath 1959 *in camera;* RX 902A *in camera;* RX 906A *in camera;* RX 1042A *in camera*). [ ] (McMath 1959 *in camera;* Disch 712).

208. It is respondents' position that despite suppliers' efforts to gather competitor price information, there nevertheless remained "a great deal of uncertainty" in this regard (DiLiddo 3257). This uncertainty is said to exist for a number of reasons:

First, the actual selling price at any given time for any given PVC resin can be difficult to determine precisely. [ ] (RX 886A *in camera;* RX 910A *in camera*), [ ] (Disch 710, 726; McMath 1951–52; DiLiddo 3251–52; see Becker 1338; RX 898A *in camera;* RX 921A *in camera;* see also CX 83A *in camera;* CX 140A-D; CX 152D *in camera;* RX 268D-E *in camera;* RX 510A).

[ ] (see RX 455A *in camera;* RX 964A; RX 965A). [**[63]**] (DiLiddo 3251–52; see RX 271P; RX 363A *in camera*). Mr. Becker, formerly of Diamond, testified that there were almost always special deals, discounts, rebates or special price concessions offered by competitors to Diamond's customers (Becker 1338). [ ] (McMath 1950; see RX 563D; RX 897A *in camera;* RX 904A *in camera;* RX 1042A *in camera*).

209. [ ] (H. Wheeler 1767; McMath 1967; RX 140Z–39 *in camera*). The volatility of prices for PVC resins, and the variety of discounts and rebates operate to make it difficult for competitors to be fully informed as to the prices offered by different suppliers at any given time (Schaefer 1197; Weber 1838).

210. A number of PVC resin producers testified that their custom-

ers attempted to mislead them concerning prices available from competing producers:

a. Mr. Schaefer testified that customers are not always truthful about current PVC prices, and that some customers will lead PVC suppliers astray (Schaefer 1136–37);

b. Similarly, Mr. Becker testified that "[s]ome buyers are particularly astute at purposely leading a salesman astray" and, some buyers "just flat [tell] a less than truth" (Becker 1337–38);

c. Mr. H. Wheeler observed that GenCorp sales personnel were misled either intentionally or unintentionally by resin customers, and that sales personnel received imperfect information about price movements (H. Wheeler 1768);

d. And, Mr. DiLiddo of Goodrich testified that he thought that a number of PVC buyers, while not actually lying, did not tell the complete story in competitive pricing situations, thereby misleading Goodrich sales personnel concerning the current level of pricing (DiLiddo 3257).

Notwithstanding the above, the evidence relied upon by complaint counsel shows that, as a practical matter, competitive price information is reasonably available to resin suppliers. **[64]**

211. [ ] (Disch 683–85; Weber 1790; DiLiddo 3253; RX 53B *in camera*).[44] While prices are negotiated at the outset, the typical contract permits price adjustments initiated by either seller or buyer (Weber 1789–90), [ ] (Disch 683–84; Weber 1789–90; see CX 73H *in camera;* CX 76C *in camera;* CX 78B *in camera;* CX 84E *in camera;* CX 89C *in camera;* CX 152B *in camera*).

[ ] (Disch 685–86; DiLiddo 3254; Weber 1797; RX 53B *in camera*). As in the case of contract accounts, these customers likewise reported competitive offers to their regular suppliers (Weber 1798–99; Schaefer 1136–37).

212. Bulk and suspension PVC suppliers obtain a considerable amount of price and other competitive information through their customers. [ ] (Disch 728; H. Wheeler 1747–48; CX 188; CX 95 *in camera;* CX 139F; CX 141C-D; CX 142; CX 143; CX 148; CX 228; CX 234; CX 239; CX 466; CX 534; CX 571).

213. [ ] (CX 99 *in camera;* CX 127; CX 128B-E; CX 149; CX 231; CX 463; CX 464; CX 470; CX 578 *in camera*).

214. Bulk and suspension PVC suppliers also learn of competitor price changes by virtue of the fact that many suppliers announce price changes publicly in the trade press (Weber 1799–1800; Becker 1248; CX 98; CX 131; CX 139E; CX 409; CX 410; CX 411; CX 413; CX 436; CX 532; CX 563; CX 711; CX 714; CX 715; CX 718; CX 719A).

215. Apart from the above, there was evidence that suppliers regularly devote serious efforts to obtain competitive price information (Weber 1799–1800; Becker 1246–48; CX 138C; CX 141A-C; CX 143; CX 148; CX 228; CX 234; CX 239; CX 241; CX 242; CX 243). Although the

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[44] The duration of such contracts appears normally to be one year (Disch 685).

information obtained from customers is not always accurate, the bulk of this intelligence is considered to **[65]** be reliable and current (Becker 1338; Wheeler 1749–50, 1768; Weber 1799). Sales and marketing personnel are specifically trained to probe and verify the accuracy of the information available (Schaefer 1136–37; Weber 1797–98; Becker 1246–47). [ ] (Becker 1248–49; H. Wheeler 1747–48; DiLiddo 3127; see McMath 1897 and 1902, 1905 *in camera*). All in all, industry witnesses believed that they generally had a good working knowledge of competitors' prices and price changes, and that they were aware of price trends in the industry (H. Wheeler 1749–50, 1768; Schaefer 1199; Becker 1338).[45]

F. Number and size of PVC purchasers

216. Mr. Disch of Tenneco estimated the number of PVC purchasers in the United States to be "probably over 2,000, but many of them buy very small volumes" (Disch 681). Dr. Eades of ICI Americas estimated total PVC buyers as "[h]undreds if not thousands" (Eades 1505). A 1979 Goodrich study summarized the market in this fashion (CX 53J-K):

> This customer base is attractive because it is readily identifiable, small enough to be reached by a manageable and economic sales force, yet not so concentrated that one or two customers can put enormous pressure on the suppliers to lower price. The biggest customer in the PVC business (Carlon) accounts for less than 7 percent of the total market. Yet three hundred customers account for some 80 percent of the total market. There are only about 1,000 customers in the United States that buy a carload or more of PVC per year.

Another study, done for Goodrich in 1979, speaks of a "broad customer base," and refers to a total of 1,426 PVC industry customers that purchase over 40,000 lbs. annually (CX 64P, S). **[66]**

Whatever the exact figures may be, the record demonstrates that the number of PVC resin purchasers is large in relation to the current number of 11 suppliers (see Finding 58, *supra*).

Furthermore, substantial numbers of this overall body of PVC purchasers appear to be present in the various segments of the resin market. [ ] (read CX 64S with CX 58K *in camera*). At the time of the hearing, Mr. Disch of Tenneco estimated the number of pipe purchasers as "probably over 100," in a segment accounting for about 40 percent (Disch 663, 683; see Yu 2091 (estimating 75 to 85).

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[45] [ ] (CX 252 *in camera;* RX 35 *in camera*), and capacity data (CX 30; CX 31; CX 32; RX 296; RX 297; RX 299; RX 303; RX 304; RX 311; RX 314).

In addition, PVC producers regularly submit monthly data on production and sales to the Society of the Plastics Industry (Goodrich Adm. 519; CX 4Z–41, 42), which compiles the information and makes it available in aggregate form as monthly and yearly figures (Goodrich Adm. 518; CX 4Z–41; CX 757; CX 758; CX 759; CX 760; CX 761; CX 762; CX 763; CX 764; CX 765; CX 766; CX 767; CX 768; CX 769).

217. The record shows that the top four purchasers in the overall PVC resin market are pipe manufacturers, *viz.*, Carlon (a Division of Indian Head Corporation), CertainTeed Corporation, Formosa Plastics Corporation U.S.A. (J-M Manufacturing Co.), and Simpson Timber Co. (Disch 682; Yu 2089, 2092; see also CX 53J). It was estimated that these four companies consume 60 percent of the total amount of PVC resin used annually in pipe production (Disch 683; see also CX 756Z–40, 41).

218. It is complaint counsel's position that regardless of the large quantities of PVC purchased by these pipe customers, none of them accounts for more than a minor fraction of overall industry sales (CPF 11.06–.09 (5 percent and less)). Respondents' counter is that they are "power buyers," whose purchases would represent such a significant portion of an individual suppliers' production that their pricing demands could not be ignored (RPF 336–38; respondents reply brief 28–29). Complaint counsel, however, points to evidence that PVC purchasers sometimes split their business among two or more sellers;[46] and that, in any event, individual purchase orders are not for annual volumes, but occur on a monthly, sometimes daily basis.[47]

G. *Repeat sales by PVC suppliers*

219. [ ] (DiLiddo 3253; Weber 1790; Disch 683–85; see, *e.g.*, *in camera* contract **[67]** exhibits: CX 72, CX 73, CX 76, CX 77, CX 80, CX 85, CX 89, CX 151, CX 152; CX 156).

[ ] (DiLiddo 3253–54; Disch 685–86; RX 53B *in camera*). These ongoing, noncontractual relationships, described by Dr. DiLiddo of Goodrich as "a handshake type of relationship, one in which we typically would sell to that customer and the customer would typically order from us based on current market conditions," operate in a way that, "when a customer needs resin, they would normally place their order with us or at least part of their business would normally come to us even though we don't have a contract" (DiLiddo 3254).

220. Once a particular PVC supplier's resin has been tested and qualified for use on a customer's fabricating equipment by its technical staff, switching suppliers would involve adjustments either to the resin's formulation or to the fabricating equipment (DiLiddo 3371–72; H. Wheeler 1747–48). Thus, according to Dr. DiLiddo, there would be a certain hesitancy on the part of purchasers to switch suppliers if competing prices were identical (DiLiddo 3272).

221. While PVC purchasers sometimes qualify more than one resin supplier to fill their requirements, those that buy from more than one

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[46] See Disch 728; Schaefer 1140; Becker 1336–37; McMath 1897–98; Yu 2171; DiLiddo 3371–72.

[47] Weber 1803–04; Disch 683–85; DiLiddo 3371–72.

supplier tend to have more than one plant. This is to ensure that the resin used in each plant is relatively consistent (DiLiddo 3371).

H. Rapid technological changes in the PVC industry

222. [ ] (see DiLiddo 3106–08; CX 53D; RX 639H *in camera*). [ ] (RX 639H *in camera*).

223. [ ] (see Eades 1464–65; McMath 1893, 1922; RX 639H *in camera*). [ ] (RX 639H, P *in camera*). As demand for bulk and suspension PVC shifted toward large volume, commodity grade end-use applications, PVC producers began to install large reactors of 18,000–35,000 gallon capacity to serve **[68]** this demand. Accompanying technology, such as computerization to ensure consistency in resin quality and efficiency using large-batch processes, was also developed (see Finding 29, *supra*).

224. While large reactors in use today in the United States range in size from 18,000 gallons to about 40,000 gallons in capacity, reactors of 50,000 gallon capacity are currently in use in Europe (Disch 638–40; Schaefer 1213–14). As noted, small reactors range in size from 2,000 to 5,000 gallons in capacity (Schaefer 1213).

225. Large reactor technology increased the efficiency of PVC production, reduced labor costs, and provided economies of scale above that available from small reactor technology (Disch 643; Schaefer 1140; see CX 515G). The cost disadvantage in using small reactors as compared to large reactors can be quite significant for producing commodity grade resins (see, *e.g.*, H. Wheeler 1734; Eades 1465).

226. [ ] (see H. Wheeler 1722–25; RX 639D, H *in camera;* CX 515G; see also Eades 1479–80). Many of the remaining small reactor plants continue to be used to manufacture specialty resin grades (H. Wheeler 1757–58; Schaefer 1078–79; Becker 1263–64). However, there was testimony that it is unlikely that new small reactor capacity would be built by a producer today (H. Wheeler 1758; Disch 640).

227. The mid-to-late 1970's was also a period for fundamental changes in the government regulatory environment facing the PVC and VCM industries (Findings 66–67, *supra*). These changes had a profound effect on the technological design, siting, and operation of plants, capital costs, and the structure of markets (see CX 642Z–5, 6; CX 504D-O; CX 597A-E; CX 505S-U). While regulations promulgated by both federal and state agencies during this period affected all aspects of the PVC and VCM businesses, environmental regulations had the greatest overall impact (CX 597C). Following the discovery of VCM as a specific cause of liver cancer, the Occupational Health and Safety Administration (OSHA) promulgated a standard in 1975 to reduce worker exposure to this product. And in 1976, the Environ-

mental Protection Agency (EPA) promulgated a standard to reduce atmospheric VCM emissions (see CX 642U). Additional environmental regulations affecting other aspects of PVC and VCM/EDC production facilities were subsequently promulgated.

228. Promulgation of the VCM emissions standard was followed by significant changes in both the PVC and VCM industries. These changes included plant and equipment modernization, process modifications, and redirection of research and development sources (Findings 66–67, *supra*). Most of the requirements regarding VCM control technology pertain to PVC plants because [69] these facilities contribute proportionately more emissions than VCM/EDC plants as a result of characteristics inherent in the batch process.

229. Changes brought about by the promulgations of the VCM emissions standard were felt most acutely by the older PVC plants, which had to retrofit their processes with new controls (CX 642Z–5). As a result of the stringent requirements, seven PVC plants were forced to close down, three on a permanent basis (CX 642Z–6). Several PVC and VCM/EDC plants were still in the design phase during development of the regulation, and their engineering had to be altered to comport with the new requirements (CX 642Z–5; see, *e.g.*, CX 505S-U; CX 504D-O). PVC producers also reported a 10–12 percent average loss in capacity as a result of compliance requirements (CX 642Z–5; see, *e.g.*, (CX 447J). This capacity loss was due mainly to the time needed to clean reactors and purge systems after each batch in an effort to reduce VCM emissions (CX 642Z–5, 6).

230. The total cost of compliance borne by producers affected by the federal VCM atmospheric emissions standard alone for the 10–year period 1977–1986 was estimated to be $765.7 million (in 1977 dollars), including investments, capital, operating, and maintenance costs for new and existing plants (CX 642Z–5).

231. The technological trend in the PVC industry throughout the 1970's toward large reactors, automation, computerized control of production, and decreased emphasis on the production of specialty PVC resins was partly prompted by and, in turn, greatly facilitated compliance with, the various environmental regulations (CX 642Z–6, 49–137).

232. Current technology appears to be well-established and stable (CX 642Z–50, 51). There was evidence that, at the present time, nearly all existing PVC plants have completed the modifications necessary for compliance (CX 642Z–6).

I. The decreased rate of growth in demand for PVC

233. There was testimony that the rate of growth in demand for bulk and suspension PVC is expected to be much lower in the 1980's

and beyond, than it was earlier in the 1960's and 1970's (DiLiddo 3107–14, 3119; Disch 691–92; Schaefer 1122; Becker 1265–68; see CX 64U; see also Liao 1518–19).

234. [ ] (see CX 64U; CX 185D *in camera*). [ ] (see DiLiddo 3110; Becker 1265–66; CX 14F *in camera;* CX 67Z–8 *in camera*). [[70]] (see RX 639H *in camera*). [ ] (see DiLiddo 3109–10; CX 67Z–8 *in camera*). Rapid growth through the 1960's and early 1970's was accounted for by the increasing end uses found for the product; its versatility enabled PVC to replace traditional materials in a multitude of applications (Disch 719; Schaefer 1154–55; DiLiddo 3108; Becker 1268–70; CX 53D). Beginning in 1979, however, average growth rates declined to the 3–4 percent range (see H. Wheeler 1731–32; Becker 1265–66; see also Eades 1471).

235. [ ] (Becker 1266–67; Eades 1470; L. Wheeler 941; DiLiddo 3112–14, 3324–25; CX 16Z–11 *in camera;* CX 513C *in camera;* CX 374E-G, L *in camera*). As observed by Dr. DiLiddo of Goodrich, "[t]he world is changing, the PVC business is maturing, the opportunities for new markets . . . have been defined to a very large degree" (DiLiddo 3324–25). There was testimony that demand for PVC is expected to rise at approximately the same rate as overall economic activity as measured by GNP, *i.e.,* in the 3–4 percent range, for the foreseeable future (Disch 690–92; Becker 1265–66; H. Wheeler 1732–33; DiLiddo 3119). In addition, a number of industry participants acknowledged that they envisioned no major new areas of growth which would change this assessment of the future rate of growth (Schaefer 1155–57; Becker 1266–68; Eades 1475; H. Wheeler 1732–33; DiLiddo 3324–25).

236. [ ] (see Liao 1519; RX 639H *in camera*). The downturn in growth that occurred in the late 1970's and early 1980's discouraged entry into the U.S. PVC market (see Eades 1468–70). A slower rate of growth in PVC demand is acknowledged by producers in the industry to have an impact on their expectations regarding new entry (see, *e.g.,* Schaefer 1133; H. Wheeler 1736; see also Eades 1486–87).

J. Price protection mechanisms in sales of PVC

237. As earlier noted, contracts for the sale of PVC frequently contain "meeting competition" clauses (Finding 211, *supra*). Furthermore, in supplier-customer dealings not involving written contracts, customers often bring competitive offers to the attention of suppliers as if a "meeting competition" proviso were in effect (Findings 211, *supra*). Under such arrangements, information regarding lower prices offered by competitors is regularly transmitted to suppliers.

238. In addition, as earlier noted, PVC sales contracts often contain

clauses requiring advance notification of price **[71]** increases (*e.g.*, 30 days). And price increases are regularly announced in advance in the trade press (Findings 211, 214, *supra*).

K. Mutual interdependence of PVC suppliers

239. Complaint counsel contends that PVC competitors are "keenly aware of their mutual interdependence" (CPF 16.01 *et seq.*). This, we are told, is manifested in the record in a variety of ways:

a. Suppliers realize that it may be an unwise strategy to attempt to gain market share by cutting prices (CPF 16.03);

b. Suppliers recognize that competitive restraint will help maintain higher prices (CPF 16.04);

c. Suppliers' willingness to sell excess PVC in the export market at a lower price, rather than adding additional supply to the domestic market (CPF 16.05);

d. The continuation by Goodrich of its tolling agreement with Diamond in an effort to maintain the PVC industry pricing structure (CPF 16.06);

e. [ ] (CX 182Z-9 *in camera;* CPF 16.06);

f. Alleged "joint actions" in connection with the raising of prices, such as trade press announcements by the various industry members (CPF 16.08);

g. The close monitoring of competitors' prices, and attempts to predict competitors' reactions in various situations (CPF 16.09);

h. Suppliers' attempts to influence the actions of competitors, including capacity expansions (CPF 16.10-.12); and

i. Suppliers' efforts to monitor capacity and changes in capacity of competitors (CPF 16.13).

240. According to the testimony of complaint counsel's economic expert, factors such as the foregoing indicate the existence of mutually interdependent behavior among competitors in the PVC market (Kaserman 2438-41). **[72]**

L. Level of capacity utilization

241. It is respondents' position that there is substantial excess capacity in the PVC industry, brought on through forecasting errors on the part of numerous suppliers (RPF 302).

242. Complaint counsel concedes that the PVC industry has experienced excess capacity in recent years, which they ascribe to the severe recession and a downturn in the PVC's growth rate (CPF 17.03 -04), and they agree that this excess capacity has had an adverse impact on profitability in the industry (CPF 17.07).

243. Complaint counsel nevertheless maintains that the implications stemming from the existence of excess capacity are uncertain.

They assert, on the one hand, that it may increase the incentive of firms to cheat on a collusive agreement (CPF 17.01); and that, on the other hand, the downturn in profitability that accompanies excess capacity may increase the incentive of firms to collude (CPF 17.02); and furthermore, that excess capacity may reduce the likelihood of new entry (CPF 6.37–.40, 17.05).

244. According to Dr. Kaserman, complaint counsel's economic expert, this factor should not be given "a great deal of weight," since in the last several years, excess capacity levels have risen and fallen according to variations in overall economic activity (Kaserman 2431). Dr. DiLiddo of Goodrich ascribed the most recent decline in demand for PVC and low capacity utilization as being reflective of general business conditions existing at that time (DiLiddo 3116–18). There was testimony of industry witnesses that surplus capacity in the manufacture of PVC would not be entirely diminished or come into balance for the next three to five years or some even longer period (Disch 691–92; Schaefer 1125; Eades 1473–74; H. Wheeler 1736–37; CX 220C).

M. Competitive performance in the PVC industry

245. On this question, respondents maintain that the competitive environment of the PVC industry is "extremely intense" (RPF 354).

246. As noted earlier (Findings 208–15, *supra*), price competition among competing PVC suppliers is brisk. [ ] (see CX 143E; CX 808A; CX 809A; Belt 1992 *in camera*, 2067).

247. [ ] (RX 907A-C *in camera;* RX 274B *in camera;* CX 527). [ ] (RX 186F *in camera*). **[73]** Mr. Disch of Tenneco testified that since the acquisition, PVC "has been a very volatile industry with, in my opinion, no profit since that time, [due to] overcapacity and a very difficult market place" (Disch 706–07; see also Disch 726). Similarly, Mr. H. Wheeler of GenCorp observed that "the profit history of the [PVC] business has been very poor" (H. Wheeler 1736). And, Goodrich's Dr. DiLiddo testified that the PVC business is "very, very competitive, such that it is impossible to generate any return," and further testified that Goodrich has "been through a blood bath for the last five years" (DiLiddo 3250, 3419).

248. Each PVC industry witness who testified described the business as highly competitive (Kienholz 849; Schaefer 1197; H. Wheeler 1767; McMath 1941–42; DiLiddo 3250, 33327; see also Disch 706–07; Becker 1338–39; Belt 2065–66). Mr. H. Wheeler of GenCorp observed that price competition in the PVC industry "is extremely intense. In 20-plus years in the chemical industry I don't think I have ever seen more intense price competition [sic] than has occurred in PVC since 1981" (H. Wheeler 1767).

249. It is the position of complaint counsel that regardless of what the record shows concerning competitive performance, this still would not, as a practical matter, indicate anything of substance concerning the legality of the acquisition (CPF 18.01 *et seq.*). This is because of the difficulties involved in determining "profits;"[48] a distortion factor brought on by excess capacity; and the importance in a Section 7 proceeding of focusing on future effects rather than past conditions (CPF 18.03).[49]

VIII. VCM QUANTITATIVE ANALYSIS

A. U.S. VCM producers

250. [**[74]**][50] (CX 662C *in camera;* CX 663E *in camera;* CX 669Z–2 *in camera;* CPF 22.17). [ ] (CX 662A *in camera;* CX 663A *in camera;* CX 669F *in camera*). [ ] (CX 662B *in camera;* CX 663C *in camera;* CX 669N *in camera;* CPF 22.16).

251. [ ] (CX 662C *in camera;* CX 663E *in camera;* CX 669Z–2 *in camera;* CPF 22.17). [ ] (Diamond Adm. 3; CX 6A; CX 662A-B *in camera;* CX 663A, C *in camera;* CX 669F, N *in camera;* CPF 24.15–.16).

252. The Dow Chemical Company ("Dow") was [__] in actual production of VCM prior to the acquisition. [ ] (CX 662C *in camera;* CX 663E *in camera;* CX 669Z–2 *in camera;* CPF 22.17). [ ] (CX 662A, B *in camera;* CX 663A *in camera;* CX 669F, N *in camera;* CPF 22.15–.16).

253. At the time of the acquisition, Shell ranked [__] in VCM production among U.S. producers, accounting in 1981 for [__] percent of VCM production. [ ] (CX 662A-C *in camera;* CX 663A, C, E *in camera;* CX 669F, N, Z–2 *in camera;* CPF 22.15–.17).

254. [ ] (CX 662C *in camera;* CX 663E *in camera;* CX 669Z–2 *in camera;* CPF 22.17). By the time of the acquisition, however, Georgia Pacific had increased its share of VCM industry capacity. [**[75]**] (CX 662A-B *in camera;* CX 663A, C *in camera;* CX 669F, N *in camera;* CPF 22.15–.16).

255. In 1981, PPG Industries ("PPG") ranked [__] in U.S. actual VCM production, with a market share of [__] percent. [ ] (CX

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[48] Further elaborating, complaint counsel asserts that even if the problems of measuring long run marginal cost curve (rather than individual segments) could be overcome, such an exercise would yield only "accounting" profits, not "economic" profits. It is the latter, we are told, which is the proper standard for measuring allocative efficiency; yet no party has attempted to make such determination on the present record. Thus, there "has been a failure of proof" (CPF 18.04–.06).

[49] Complaint counsel urges that excess capacity in recent years is likely to be a temporary phenomenon, and that industry structure has changed by virtue of the reduction of the number of competitors from 17 in January 1982 to a present 11 (CPF 18.08).

[50] The market share and industry capacity figures in this section reflect the size and distribution of VCM producers in January 1981, one year prior to the acquisition, and January 1, 1982, immediately preceding the acquisition.

662A-C *in camera;* CX 663A, C, E *in camera;* CX 669F, N, Z-2 *in camera;* CPF 22.15-.17).

256. [ ] (CX 662C *in camera;* CX 663E *in camera;* CX 669Z-2, N *in camera;* CPF 22.17). Conoco's ranking remained virtually unchanged in the period immediately preceding the acquisition. [ ] (CX 662A-B *in camera;* CX 663A, C *in camera;* CX 669F, N *in camera;* CPF 22.15-.16).

257. [ ] (CX 662C *in camera;* CX 663E *in camera;* CX 669Z-2 *in camera;* CPF 22.17). [ ] (CX 302B *in camera;* CX 321B *in camera;* CX 373G *in camera*). Accordingly, the 1981 capacity data reflect Borden's partial interest in the joint venture. [ ] (CX 302B *in camera;* CX 321B *in camera*). [ ] (CX 662A-B *in camera;* CX 663A, C *in camera;* CX 669F, N *in camera;* CPF 22.15-.16).

258. [ ] (CX 321B *in camera;* CX 662C *in camera;* CX 663E *in camera;* CX 669Z-2 *in camera;* CPF 22.17). Uniroyal exited the VCM business at the end of 1981 when it withdrew its participation in the Monochem venture (CX 321B).

259. Ethyl ranked [__] in actual VCM production in 1981 accounting for [__] percent of the United States VCM supply. At the time of the acquisition, Ethyl remained [__] in VCM production by all measurements. [ ] (CX 662A-B **[76]** *in camera;* CX 663A, C, E *in camera;* CX 669F, N, Z-2 *in camera;* CPF 22.15-.17).

260. Formosa Plastics Corporation accounted for [__] percent of 1981 actual VCM production, placing it [__] among United States producers. [ ] (CX 662A-C *in camera;* CX 663A, C, E *in camera;* CX 669F, N, Z-2 *in camera;* CPF 22.15-.17).

261. [ ] (CX 318A *in camera*). [ ] (CX 662C *in camera;* CX 663E *in camera;* CX 669Z-2 *in camera;* CPF 22.17).

B. Concentration in the VCM market

1. The effect of the acquisition on concentration

262. Goodrich's acquisition of Diamond Shamrock's VCM plant resulted in an increase in concentration in the VCM product market in the U.S. Following the acquisition, the HHI measurement of industry nameplate capacity increased 226 points to a level of 1,529 (CPF 22.15). The practical production capacity HHI increased 253 points to a level of 1,552 (CPF 22.16). Measured in terms of actual VCM production, the acquisition produced an increase of 304 points in the HHI to a level of 1,663 (CPF 22.17).

263. Four-firm concentration figures also increased following the acquisition. Measured in terms of nameplate capacity, four-firm concentration rose 10.6 percent to a level of 70.8 percent (CPF 22.15). Four-firm concentration in practical capacity increased by 10.5 per-

cent to a level of 71.3 percent (CPF 22.16). And the four-firm concentration measurement increased 7.5 percent to a level of 72.6 percent (CPF 22.17).

264. Two-firm concentration levels likewise increased as a result of the acquisition. In nameplate capacity, two-firm concentration rose by [__] percent to [__] percent (CPF 22.15). Two-firm concentration in practical production capacity increased [__] percent to a level of [__] percent (CPF 22.16). And [77] measured in terms of VCM production, two-firm concentration increased by [__] percent to a level of [__] percent (CPF 22.17).[51]

2. Concentration trends

265. Concentration in VCM production capacity has increased in each of the years since the January 1982 acquisition (CPF 22.23–.24). Prior to the acquisition, there were 12 U.S. producers of VCM. By the time of the acquisition, the number of firms in the VCM market had declined to 10, because of the exits of Stauffer and Uniroyal. Following the acquisition, Diamond Shamrock was no longer in the market, and the next year Ethyl ceased production (CPF 22.23–.24). Thus, by January 1984, the number of VCM producers in the market had declined to eight, and the market has remained at that level up to the present. Finally, since the Goodrich acquisition, three VCM producers, Dow, Shell, and PPG, each have shut down a VCM plant (CPF 22.23–.24).

266. Following the acquisition, Goodrich assumed the leader position in industry practical production capacity, and ranked closely behind Dow in industry nameplate capacity (CPF 22.23–.24). Concentration in HHI terms was essentially level in the year immediately prior to the acquisition, measuring between 1293 and 1318 in 1981 and 1982 nameplate and practical production capacity. Concentration in the VCM market has risen successively following the acquisition, with the HHI in nameplate and practical production capacity respectively reaching 1433 and 1468 in January 1983, 1559 and 1575 by January 1984, and 1632 and 1650 by January 1985 (CPF 22.23–.24).

IX. VCM QUALITATIVE ANALYSIS

A. Entry considerations

267. According to complaint counsel's economic expert, Dr. Kaserman, there are five factors significantly affecting the conditions of entry into the VCM market: (1) the size of the minimum efficient scale plant; (2) the magnitude of sunk costs; (3) the lead time required for

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[51] Eight-firm concentration figures show an increase in nameplate capacity of 3.5 percent to a level of 96.8 percent; an increase in practical capacity of 3.4 percent to a level of 96.8 percent; and an increase measured by VCM production of 3 percent to a level of 97 percent (CPF 22.15–.17).

planning, permitting, and construction of new plants; (4) the presence or absence of excess capacity in the industry; and (5) the extent of vertical integration in the industry (Kaserman 2472). **[78]**

1. Minimum efficient scale plant

268. [ ] (L. Wheeler 928; DiLiddo 3290–91; see Taylor 1563; CX 557Z–21 *in camera*). In constructing its VCM plant in the 1970's, Diamond Shamrock "considered it essential to build a plant with a production capacity of one billion pounds of VCM per year" (CX 424B; see also Diamond Adm. 429; CX 6R). [ ] (CX 44A *in camera*). Dr. Eades of ICI concluded that a plant capacity of one billion pounds per year would be more desirable than a 500 million pound plant (Eades 1462).[52]

269. The capacities of more recently constructed VCM plants support the conclusion that a minimum efficient scale plant is approximately [ ] to [ ] pounds per year. [ ] (Goodrich Adm. 1; CX 4A; CX 310C *in camera*). [ ] (Goodrich Adm. 731; CX 4Z–73); and Shell's plant at Deer Park, Texas (CX 316C *in camera*). Although Formosa Plastics recently constructed a 500 million pound plant at Point Comfort, Texas, Mr. Liao testified that it was sized to match the company's PVC plant previously built at the same site, and that Formosa did not possess experience with building larger VCM plants (Liao 1532–34).

2. Sunk costs

270. In assessing the magnitude of sunk costs in the VCM industry, it should be kept in mind that VCM plants are durable and highly specialized (Klass 4397, 4521–24; CPF 23.20). One **[79]** cannot normally produce materials other than VCM in a VCM plant (L. Wheeler 989–90).[53]

271. Mr. Kienholz of PPG testified that sunk costs represent virtually all of the total value of a VCM plant (Kienholz 820–21). [ ] (CX 40W *in camera* (30 years)). There was testimony that investment in a new plant would entail considerable financial risk (DiLiddo 3134–37), and that, should it be necessary to close the plant, virtually the entire investment could be lost (Kienholz 783; see also DiLiddo 3396). This indeed was the case when PPG closed its Puerto Rican plant in 1978 (Kienholz 775–76).

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[52] According to Goodrich, at least, there may be scale economies in plants larger than one billion pounds. Goodrich expected to achieve further scale economies in its proposed 1.6 billion pound-per-year facility at Convent, Louisiana (DiLiddo 3341).

[53] One can, of course, manufacture EDC in the front portion of a VCM plant, since the production of EDC is the first step in the VCM manufacturing process. However, the EDC portion of the plant would amount to only 10 percent of the total capital of a VCM plant (L. Wheeler 990).

3. Required lead time

272. [ ] (Taylor 1581; CX 36Q, S *in camera;* CX 5Z–5; CX 182I *in camera;* CX 439B; see also Diamond Adm. 416; CX 6R; CX 440M; CPF 23.25–.33).

273. [ ] (Taylor 1581; CX 36Q, S; CX 52Z–5 *in camera;* see CX 440M).

274. Prior to beginning plant construction, however, it is necessary to obtain necessary environmental permits[54] (DiLiddo 3188–89; Diamond Adm. 413; CX 6Q; Goodrich Adm. 368, CX 4Z–19). [ ] (Diamond Adm. 415; CX 6Q), [ ] (Kienholz 804; CX 440M; CX 15A; CX 36S *in camera;* CX 39Z–6 *in camera*).

275. In addition, certain engineering work must be performed even before applying for regulatory permits, since the resulting information must be presented in the permit applications (DiLiddo 3337). In this connection, the basic technology and capacity of the plant must be determined (DiLiddo 3337). This pre-permit engineering, according to Goodrich, could take approximately six months (DiLiddo 3337). In 1980, EPA amended its regulations to [80] require that air quality near the site might have to be monitored for a period of time prior to applying for permits (40 CFR 51.24(m), 40 CFR 52.21(m)). This change may add even additional time to the process of obtaining permits.

276. Another factor to be considered prior to filing for permits, is selecting a site for a new VCM facility. This itself can be a "complicated" process (see DiLiddo 3335–37), including raw material and product logistics, community acceptance, labor relations, labor supply, political climate, and the availability of local support services (CX 574I, M-U; see also RX 1061D-E; RX 1304; RX 1308; Diamond Adm. 221; CX 6J; Diamond Adm. 222; CX 6J; Diamond Adm. 414; CX 6Q; Diamond Adm. 436; CX 6R).

277. A new entrant may also need time to evaluate and license VCM manufacturing technology. There was testimony that this could take approximately six months (Kienholz 804). [ ] (see CX 523 *in camera;* CX 53A).

278. Formosa Plastics' recent entry experience supports the four-to-five year lead time estimation. Formosa Plastics began looking for a site for its PVC/VCM complex in the latter half of 1978 (Liao 1523), and commenced production at the beginning of 1983 (Liao 1534–35). This time period does not include any time spent for strategic analysis prior to the search for a site. Furthermore, Formosa already had its own VCM production technology (Liao 1539), and had had experience in the U.S. market through its participation in its Rico Chemicals project (Liao 1519–1522).

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[54] See discussion of the various regulatory requirements for PVC and VCM plants, *supra*, Findings 66–67.

279. Goodrich's proposed VCM plant at Convent, Louisiana is also instructive in assessing the lead time necessary for a new VCM entrant. [ ] (DiLiddo 3337; CX 48Q; CX 52Z–5 *in camera*). Prior to the July 1979 announcement, Goodrich had completed an extensive PVC/VCM strategy study over an eight-month time period (DiLiddo 3335; CX 53A). During these eight months, Goodrich had also completed a complex site selection process and had chosen the Convent, Louisiana site (DiLiddo 3336).

4. Excess capacity

280. Complaint counsel's economic expert testified that excess capacity in VCM makes entry less likely (Kaserman 2328–29, 2337). **[81]**

281. There has been excess capacity in the VCM industry since 1981 (CPF 34.02). There was testimony from industry witnesses that this condition is expected to continue for the foreseeable future (L. Wheeler 938; Schaefer 1190; Taylor 1570). However, complaint counsel makes the point that the magnitude of excess capacity has declined, as demand conditions improve following the recent recession (CPF 34.02; CPF 34.06).

5. Extent of vertical integration

282. [ ] (Findings 76–78, *supra*), [ ] (CX 667 *in camera*), [ ] (CX 667I-J *in camera*).

B. VCM is a homogeneous product

283. Physically, VCM is admittedly a fungible product, with only trace differences (Goodrich Adm. 465; CX 4Z–33; Diamond Adm. 505; CX 6U, Z–65). [ ] (CX 376K *in camera;* Goodrich Adm. 464; CX 4Z–33; Diamond Adm. 504; CX 6U, Z–65). [ ] (L. Wheeler 918; CX 376K *in camera;* CX 557K *in camera*).

284. VCM plants are located in [ ]. [ ] (see CX 302B; CX 304B *in camera;* CX 305D *in camera;* CX 308B-C; CX 310C *in camera;* CX 315F *in camera;* CX 376C *in camera;* CX 316C *in camera;* Goodrich Adm. 1; CX 4A; Goodrich Adm. 728; CX 4Z–73).

285. The VCM industry is not undergoing significant process or product technological change (CPF 29.01–.08; see Findings 309–312, *infra*). Nor is there customized production of VCM; VCM producers carry inventories (Kienholz 816); make spot sales (see Taylor 1668), and post prices (see CX 702; CX 703; CX 705; CX 707).

286. Respondents describe VCM as [ ] (Kienholz 848; L. Wheeler 930, 1011, 1013; Schaefer 1128–29, 1145, 1186, 1189–90; Taylor 1564; H. Wheeler 1760–61; RX 57Z–35, Z–58–63, Z–87 *in camera;* RX 138E *in camera;* RX 380A *in camera*).

C. VCM elasticity of demand

287. In measuring the price elasticity of demand for VCM, it is significant that VCM is an intermediate (or input) product **[82]** rather than a consumer good (Kaserman 2369). Complaint counsel's economic expert testified that the price elasticity of demand for an intermediate product is a function of three factors: (1) the ease of substitutability between the intermediate product and other inputs in the production of the final product; (2) the cost share of the intermediate product in the production of the final products; and (3) the price elasticity of demand for the final products produced from the intermediate product (Kaserman 2370–71). He further testified that where there is no substitutability between the intermediate product and other inputs in the manufacture of the final product, the price elasticity of demand of the intermediate product will necessarily be lower than the price elasticity of demand for the final product (Kaserman 2377).

288. A consideration of these factors points to the conclusion that the price elasticity of demand for VCM is low. First, there is no substitutability between VCM and other input products in the manufacture of PVC (Kaserman 2376–77; Finding 17). Second, the cost share of VCM is only a portion of the cost of producing bulk and suspension PVC end-use products (Kaserman 2375). Third, as noted in Findings 94–193, *supra,* the elasticity of demand for bulk and suspension PVC is relatively low (Kaserman 2373). Because there is no substitutability between VCM and other input products in the manufacture of bulk and suspension PVC, it is apparent that the price elasticity of demand for VCM is lower than the price elasticity of demand for bulk and suspension PVC (Kaserman 2377; Klass 4003–11, 4533).

289. Approximately 96 percent of the VCM supply is used in the manufacture of PVC (Kaserman 2484; L. Wheeler 919; see also Diamond Adm. 62; CX 6D, Z–37). The record confirms that VCM is the only raw material suitable for this purpose (Diamond Adm. 57; CX 6D, Z–36). [ ] (see, *e.g.,* CX 246 *in camera*).

D. Similarity of VCM production costs

290. The costs of manufacturing VCM can be divided into two categories: (1) the costs of converting ethylene and chlorine into VCM; and (2) the cost of the ethylene and chlorine feedstocks.

291. VCM producers have access to similar manufacturing technology. There are no significant patents that would give one firm a cost advantage over another. "Most firms, if not all, have access to effective production technology which enables them to produce large

volumes at low costs" (Klass 4008–09). Thus, Mr. Kienholz noted that PPG was "competing with producers who pretty much have the same advantages as PPG does" (Kienholz 809). He further noted that in "VCM you don't have a particular [83] proprietary niche that allows one firm to achieve returns or earnings that somebody else wouldn't" (Kienholz 884).

292. Indeed, VCM producers employ similar manufacturing processes. [ ] (*cf.* CX 302B *in camera;* CX 557D *in camera;* CX 557Z–5 *in camera*). [ ] (*cf.* CX 302B *in camera;* CX 557D *in camera;* CX 557Z–5 *in camera* with CX 663 *in camera*). [ ] (CX 557Z–5 *in camera*). "There is no great competitive advantage in the VCM operation between one person's process and another's" (Kienholz 809–10).

293. [ ] (see RX 428F-G *in camera*). These chemicals are consumed in fixed proportions to the amount of VCM produced (L. Wheeler 917–18; *cf.* Goodrich Adm. 59–60; CX 4I). All producers use similar quantities of ethylene and chlorine in the manufacture of VCM (*cf.* Goodrich Adm. 59–60; CX 4I; L. Wheeler 917–18).

294. [ ] (CX 297Z–3 *in camera;* CX 473A-B; RX 107L *in camera;* RX 429A *in camera*), it appears likely that VCM firms would pay similar prices for these chemicals.[55]

295. There was testimony from industry witnesses that VCM firms have similar production costs. Mr. Wheeler of Shell testified that there was only a difference of one-half cent per pound in short run avoidable costs across the spectrum of the firms in the industry (L. Wheeler 936–38). Mr. Kienholz of PPG agreed that there were no significant differences among firms in the cost of producing VCM (Kienholz 814). Mr. Taylor of Dow also was of the belief that VCM producers had similar manufacturing costs (Taylor 1685). [ ] (RX 57Z–29, 128, 131 *in camera*).

E. The availability of price information in the VCM market

296. [ ] (Taylor 1663–68; L. Wheeler 958 *in camera*). [[84]] (Goodrich Adm. 507; CX 4Z–40; *cf.* Taylor 1596; L. Wheeler 960 *in camera*). Contacts often require the seller to give notice a certain number of days in advance of price increases (Goodrich Adm. 509; CX 4Z–40; see also CX 206; CX 207; CX 212; CX 215; CX 229). [ ] (Wheeler 958–60 *in camera;* Taylor 1594–95).

297. [ ] (see Schaefer 1223 *in camera;* CX 88X-Y *in camera*).

298. VCM suppliers obtain a considerable amount of price information through their customers. By bringing competitive offers to their

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[55] As with PVC (Finding 203, *supra*), complaint counsel relies upon the significance of "economic costs" as compared to "accounting" costs (CPF 26.10 *et seq.*).

regular supplier's attention, pursuant to meeting competition clauses in contracts, customers provide information concerning prices offered by VCM competitors (Kienholz 810–11).

299. VCM suppliers also learn of competitive price changes through public announcements in the trade press (see, *e.g.*, CX 736; CX 737; CX 739).

300. [ ] (Wheeler 958–60 *in camera;* Taylor 1596; Goodrich Adm. 509; CX 4Z–40). In practice, advance notice of VCM price increases is a common practice (see, *e.g.*, CX 702; CX 705; CX 707; CX 735; CX 736; CX 739).

301. [ ] (see DiLiddo 3295 *in camera*, 3299; CX 88 *in camera;* CX 24 *in camera;* CX 26 *in camera*). One reason for the existence of these arguments is that a number of VCM producers are also PVC producers. Thus, they may enter into VCM supply arrangements as either a supplier or a customer. [ ] (see, *e.g.*, CX 206A; CX 207; CX 208; CX 212; CX 213; CX 214; CX 215; CX 217 *in camera*).

302. Competitive pricing information obtained by VCM firms is relatively reliable and accurate (see, *e.g.*, Diamond Adm. 535; CX 6V, Z–67).

303. [ ] (Kienholz 853–56; L. Wheeler 1020–24 *in camera;* Schaefer 1193–95; DiLiddo 3306–09). Mr. Schaefer noted that it had been a "topic of conversation in the industry" (Schaefer 1193). Mr. Kienholz **[85]** believed his information about the nature of the contract was "quite good" (Kienholz 854). In similar vein, Dr. DiLiddo of Goodrich described the outlines of a supply contract between Dow and Shintech (DiLiddo 3313).

304. As part of their intelligence gathering operations, VCM producers also make efforts to monitor competitors' market shares (Diamond Adm. 523; CX 6V, Z–66; CX 169F). [ ] (see, *e.g.*, CX 97I *in camera;* CX 146; CX 215; CX 238E; CX 425; CX 541 *in camera;* CX 542 *in camera;* RX 302; RX 307; RX 311; RX 362 *in camera;* RX 367 *in camera;* RX 379C *in camera;* RX 401F; RX 427D *in camera;* Diamond Adm. 520; CX 6V, Z–66).

F. Repeat sales by VCM producers

305. [ ] (Weber 1839–40; L. Wheeler 958 *in camera;* Kienholz 811–12; Taylor 1592–93; Schaefer 1145; see, *e.g.*, CX 26A *in camera*).

306. [ ] (Taylor 1567–68; Schaefer 1145; see, *e.g.*, CX 24A-J *in camera;* CX 25A-E *in camera;* CX 26A-R *in camera*).

307. Approximately one-half of the VCM sold in the U.S. is transported by pipeline from suppliers' plants to their customers' premises (L. Wheeler 989; Taylor 1564). There was testimony that pipeline transportation of VCM offers economic and safety advantages over alternative modes of transportation, such as railcar or barge (Kien-

holz 756, 759–60, 789; L. Wheeler 980–81; Taylor 1563–64; Schaefer 1129). Once a connecting pipeline has been put in place, the cost savings involved would render it unlikely that a VCM customer would switch to a non-pipeline supplier as a primary source (Kienholz 787–88, 790, 868–70; Taylor 1566–67; *cf.* Schaefer 1129).

308. [ ] (Kaserman 2500; see, *e.g.*, Schaefer 1145; CX 523T *in camera;* CX 419).

G. Rapid technological changes in VCM industry

309. The principal commercial process by which VCM is produced today is the thermal cracking of ethylene dichloride ("EDC") (Finding 32, *supra;* see L. Wheeler 918–26; Kienholz 756–58). **[86]**

310. [ ] (Finding 32, n. 7, *supra;* see CX 40Q *in camera;* CX 39T *in camera*). Thus, prior to 1960, acetylene was the primary feedstock. However, acetylene supply became inadequate following World War II to support the growing demand for VCM. [ ] (see CX 40R *in camera;* CX 39U *in camera;* RX 57U *in camera*). [ ] (CX 40R *in camera;* CX 39U *in camera*). The rapid replacement of acetylene-based technology with that of ethylene proceeded throughout the late 1960's and the 1970's. [ ] (see L. Wheeler 924–25; CX 40V *in camera;* CX 39Y *in camera*).

311. [ ] (see CX 40R *in camera;* CX 39U *in camera*). All VCM plants built since the late 1960's have employed the ethylene technology. At the present time, only one producer, Monochem uses acetylene technology; its plant at Geismar, Louisiana accounting for less than 2 percent of total domestic VCM practical production capacity.

312. [ ] (Kienholz 794; L. Wheeler 989; Taylor 1592; CX 557H *in camera;* RX 57W-Y *in camera*). [ ] (CX 40U, H *in camera;* CX 39X *in camera*). [ ] (CX 40V *in camera;* CX 39Y *in camera;* RX 57W).[56]

H. The decreased rate of growth in demand for VCM

313. According to the record, the rate of growth in demand for VCM has been and is expected to be significantly lower in the 1980's than in the 1960's and 1970's. As VCM is the principal **[87]** input in the production of PVC, the growth in demand for VCM is closely tied to the growth in demand for PVC (see L. Wheeler 941; Kienholz 756; Taylor 1556–57).

314. Annual growth rates for VCM in the 1960's were in the 12–15 percent range (Kienholz 792; Taylor 1558; CX 541B). Growth rates for VCM in the early 1970's were in the 8–10 percent range (See Kienholz 792; L. Wheeler 942–43).

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[56] Vinyl chloride emissions control technology as it applies to EDC/VCM manufacturing is also considered to be well-established and stable (see Finding 232, *supra;* see generally CX 642B-O, Z-12-19, 52).

315. [ ] (Taylor 1571; CX 541B *in camera;* CX 542A *in camera*). [ ] (Taylor 1572; see also Kienholz 793; CX 554C *in camera*).

316. Industry witnesses testified that overall demand for VCM is expected to grow at about the same rate as overall economic activity, as measured by GNP. This would mean an increase in demand for VCM of only about 3 percent per year for the foreseeable future (Kienholz 792; L. Wheeler 940; Taylor 1571).

I. Price protection mechanisms in sales of PVC

317. As earlier discussed, Finding 211, *supra*, most contracts for the sale of VCM contain price protection clauses. These include most favored nation and meeting competition provisions (also known as meet-or-release clauses) (*cf.* Klass 5675, 5704). They also include clauses requiring advance notice of price increases.

J. Mutual interdependence of VCM suppliers

318. Complaint counsel contends that VCM suppliers are "keenly aware of their mutual interdependence" (CPF 32.01), manifested in the record in a variety of ways:

a. Suppliers recognize that competitive restraint will help maintain higher prices (CPF 32.02);

b. Suppliers' willingness to sell VCM in the export market at prices lower than the prices received for VCM in the United States, rather than adding additional supply to the domestic market which could result in lower prices (CPF 32.04);

c. Suppliers' efforts to monitor the pricing activities of competitors (CPF 32.05); [88]

d. The realization by suppliers that their actions may cause a reaction by competitors, resulting in adjustment of suppliers' behavior (CPF 32.06);

e. Suppliers efforts to monitor capacity and changes in capacity of competitors, and suppliers' attempts to influence the capacity decisions of competitors (CPF 32.07); and

f. Goodrich's "preemptive strategy" in planning the size, timing and publicity of its new Convent, Louisiana plant to discourage expansions by competitors and the entry of new firms (CPF 32.08).

K. Previous collusive behavior in the VCM industry

319. According to complaint counsel, the record contains "strong evidence" that during the late 1970's the VCM market was characterized by "disciplined, collusive pricing and price leadership" (CPF 33.01).

320. Evidence cited in support of the above assertion includes observations by PVC producers regarding the "strong discipline" of VCM suppliers in being able to maintain high prices in the face of adverse PVC market conditions (CPF 33.02).

321. Complaint counsel finds further support for their proposition in the consideration by certain PVC producers of integrating backwards into VCM, a step actually taken by Diamond and Georgia Pacific in 1978 and 1980, respectively (CPF 33.03).

322. As for the existence of price leadership, which "may make collusion more likely," the evidence relied on by complaint counsel identifies the VCM producer in the price leadership position to be Dow Chemical (CPF 33.04).

L. Level of VCM capacity utilization

323. Respondents maintain that substantial over-capacity exists among VCM producers, which is expected to continue for the foreseeable future (RPF 447; L. Wheeler 938; Schaefer 1190; Taylor 1570; Kaserman 2873).

324. According to complaint counsel's economic expert, however, the existence of excess capacity is not a factor to be accorded much weight (Kaserman 2503-04). As in the case of PVC, economists can regard this as beneficial or not, depending on one's point of view (see Finding 244, *supra*). [89]

325. [ ] (Schaefer 1126; Kienholz 774; see L. Wheeler 941–43; RX 873A *in camera;* RX 853A *in camera;* see especially VCM capacity utilization table set forth in CPF 34.02).

326. There was testimony of industry witnesses that the level of VCM capacity utilization improved in 1984 (Kienholz 796; L. Wheeler 943; Taylor 1572); that continued improvement in utilization would occur over the next few years, so that new capacity might be needed near the turn of the 1990 decade (Kienholz 796–97; L. Wheeler 947–48; Taylor 1580).

M. Competitive performance in the VCM industry

327. [ ] (Disch 697–99; Kienholz 768, 850; L. Wheeler 1025 *in camera;* see RX 987A; RX 428E *in camera;* RX 747C *in camera*).

328. [ ] (Taylor 1672; see H. Wheeler 1766–67; see L. Wheeler 1051 *in camera*).

329. [ ] (Klass 4537–41, 5462–65; RX 365A *in camera;* RX 431A *in camera;* RX 688C; RX 856A *in camera;* see RX 379E *in camera*).

330. Moreover, a number of industry witnesses testified as follows regarding the competitive nature of the VCM industry:

a. Mr. Paul Kienholz of PPG testified that "competition" was what basically determined the price of VCM and, further, that the VCM market was "extremely competitive" (Kienholz 805, 849).

b. [ ] (L. Wheeler 991; see RX 873A-E *in camera*).

c. Mr. Ronald Taylor of Dow testified that VCM producers competed on the basis of price, and also on the basis of other terms, like credit provisions, that may affect price (Taylor 1672). **[90]**

d. Dr. DiLiddo of Goodrich testified that the state of competition in VCM "is absolutely cutthroat" and that in the future competition "is going to be very, very vigorous" (DiLiddo 3327).

331. It is the position of complaint counsel, however, that regardless of what the record shows concerning competitive performance, this nevertheless would not, as a practical matter, indicate anything of substance concerning the effects of the Goodrich acquisition (Kaserman 2444–48, 2511–12). This is because of the difficulties involved in determining "profits;"[57] a distortion factor brought on by excess capacity; and the importance in a Section 7 proceeding of focusing on future effects rather than on past conditions.[58] **[91]**

DISCUSSION

The Commission has but recently had occasion to set forth its view concerning the analytical framework within which to evaluate the legality of corporate acquisitions. In its decision in *Echlin Manufacturing Co.*, Docket 9157, the following statement appears (slip op. at 8–9, June 28, 1985):

> Section 7 of the Clayton Act prohibits acquisitions that may have the effect of substantially lessening competition or tending to create a monopoly. Because Section 7 applies to "incipient" violations, actual anticompetitive effects need not be shown; an acquisition is unlawful if such an effect is reasonably probable. *E.g., American Medical International, Inc.*, No. 9158, slip op. at 17–18 (FTC July 2, 1984).
>
> Traditionally, an analysis under Section 7 begins with the definition of a relevant market and measurement of the concentration in that market. *See generally* FTC Statement §§ III, VI; DOJ Guidelines § 2, 3.11. This approach by itself is unsatisfactory, however, because it fails to reflect many factors that can determine whether

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[57] Complaint counsel contend that even if the problems of measuring long-run marginal cost curve (rather than individual components) could be overcome, such an exercise would yield only "accounting" profits, not "economic" profits. It is the latter, in their view, which is the proper standard for measuring allocative efficiency; yet no party has attempted to make such a determination on the present record. Thus, there "has been a failure of proof" (CPF 35.04–.06).

[58] Complaint counsel urges that the excess capacity factor in recent years "is likely to be a temporary phenomenon" (CPF 35.08).

> a merger is likely to lessen competition substantially by enabling one or more sellers to impose higher prices than would prevail under competitive conditions. *See Grand Union Co.*, 102 FTC 812, 1038–41 (1983). Therefore, the Commission also looks to other considerations that bear on the likelihood of anticompetitive effects. *See generally* FTC Statement § III; DOJ Guidelines §§ 3.21 to 3.45. These additional considerations often do not lend themselves to precise mathematical expression, but they can be more important than quantitative measures of concentration. *See American Medical International, Inc.*, No. 9158, slip op. at 27 (FTC July 2, 1984).

The focus of this proceeding is upon those "additional considerations" referred to by the Commission in its *Echlin* decision.

This is not to say, however, that the quantitative aspects of the Goodrich acquisition were not addressed in this case. In fact, evidence was presented concerning the acquisition's effect upon concentration in both the PVC and VCM markets, and appropriate findings have been made (Findings 49–53, 262–64, *supra*).

In short, the findings show a rise in HHI in PVC of 113 to a level of 1,098 measured by nameplate capacity; and a rise of 112 to 1,079 measured by practical production capacity. Neither [92] Dr. Kaserman nor Dr. Klass, the respective parties' expert witnesses, attached much significance to the HHI PVC figures standing alone (Kaserman 2451; Klass 4121).

The HHI figures as to VCM show a rise of 226 to a level of 1,529 measured by nameplate capacity; a rise of 253 to a level of 1,552 measured by practical production capacity; and a rise of 304 to a level of 1,663 measured by actual production. Respondents' expert, Dr. Klass, described these figures "as being essentially in the middle of the range of moderate concentration" (Klass 4479), while his counterpart, Dr. Kaserman, placed the numbers "toward the upper end of the moderate concentration level," greatly exceeding the DOJ guideline level (Kaserman 2465–66). Neither expert, however, believed that an inquiry into the competitive significance of the Goodrich acquisition as to VCM should be decided by reference to these figures alone. Both believed that an examination of additional factors was needed (Kaserman 2471; Klass 4479).

Turning then to the qualitative side of this case, complaint counsel has identified and offered evidence with respect to several "additional considerations" deemed relevant on the question of whether the Goodrich acquisition may pave the way for "collusion" among the various PVC and VCM producers with respect to raising prices and restricting output. We take up these points in order, and make the following observations:

PVC

a. *Entry considerations* (Findings 59–84). While the parties agree that there are no "Stigler type" entry barriers, I nevertheless agree with complaint counsel that entry into the manufacture of bulk and suspension PVC "is difficult and takes a long time" (CPF 6.01). The size of a minimum efficient scale plant alone can be conservatively placed at 500 million pounds of PVC output per year (Findings 60–62). The magnitude of sunk costs, while perhaps not overwhelming to a large oil or chemical company full bent on entry or capacity expansion, is certainly sufficient to give any potential entrant grave pause (Finding 63; see DiLiddo 3396). The lead time required for *de novo* entry has been established in the record as being at least four, and perhaps five years (Findings 64–72). And potential entrants into PVC manufacture would be faced with formidable problems presented by the industry's existing excess capacity, and the extent of vertical integration in the industry (Findings 73–78). Moreover, the record shows that there has, as a practical matter, been no *de novo* entry into the manufacture of PVC over the last decade. It is true, as respondents urge, that PVC suppliers have from time to time expanded their capacities in the face of rising demand. Yet this has not been the general experience of the industry in recent years (Findings 79–84). [93]

b. *PVC homogeneity.* The record shows that, within grades, bulk and suspension PVC is, on the whole, physically fungible and therefore homogeneous (Findings 85–90). Respondents' contention based upon "commercial heterogeneity" is, I believe, beside the point and must be rejected (Findings 91–93).

c. *PVC elasticity of demand.* The findings on this point establish that (1) there are no substitutes for PVC in the manufacture of PVC finished end products (Findings 94–95); (2) the cost share of PVC in many finished end products is low (Finding 96); and (3) elasticity of demand for many PVC end products is low, basically because of their physical properties and because they are relatively inexpensive (Findings 97–193). It follows that demand for bulk and suspension PVC is at least relatively inelastic.

d. *Similarity of PVC raw material and production costs.* Respondents rely upon various estimates in the record indicating variances among producers in costs of manufacture. Complaint counsel questions the accuracy of such information, and rely upon the fact that manufacturing technology, especially respecting large reactors, is similar (Findings 194–201).

As to raw materials, respondents contend that costs of VCM to PVC manufacturers vary, depending in large part upon whether it was

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produced in-house or obtained elsewhere. Complaint counsel responds that all suppliers "pay" market value if in-house VCM is valued at the price the integrated firm could sell it for if it were not consumed internally (Findings 202–03).

Whichever party may be "right" on this point, it seems only logical that producers who have access to similar technology and similar raw materials would tend to have similar costs of manufacture.

e. *Availability of price information in the PVC resin market.* Respondents maintain that despite the efforts of competing suppliers to monitor such information, there nevertheless remains a good deal of uncertainty regarding prices charged for PVC (Finding 205–10). The record nevertheless establishes that, as a practical matter, reliable competitive price information is reasonably available to resin suppliers (Findings 211–15).

f. *Number and size of PVC purchasers.* Informed estimates of industry witnesses place the number of PVC purchasers as being somewhere between one and two thousand, largely disbursed throughout all segments of the PVC resin market. Although four of these purchasers together account for a major portion of the pipe grade market, none of these account for more than a minor fraction of overall industry sales (Findings 216–18). [94]

g. *Repeat sales by PVC suppliers.* The record shows a high incidence of PVC repeat sales made pursuant to regular ongoing customer/supplier relationships, either contractual or noncontractual (Findings 219–21).

h. *Technological state of PVC manufacturing.* Current PVC manufacturing technology appears to be well-established and stable, following the switchover of a major portion of PVC production to large reactors and automation, and following compliance by industry with federal safety and environmental regulations (Findings 222–32).

i. *Decreased rate of growth in demand for PVC.* Although the PVC market grew rapidly in the 1960's and into the 1970's, it was generally acknowledged by industry witnesses that PVC is presently a mature product whose rate of growth in demand is expected to be much lower in the 1980's and beyond (Findings 233–36).

j. *Price protection mechanisms in sales of PVC.* Contracts for the sale of PVC frequently contain two forms of price protection provisions: meeting competition clauses and clauses requiring advance notice of price increases (Findings 237–38).

k. *Mutual interdependence of PVC suppliers.* It is the contention of complaint counsel that PVC suppliers are "keenly aware of their mutual interdependence," as manifested in a variety of ways set forth in Findings 239–40.

l. *Excess PVC capacity.* There has unquestionably been an excess capacity situation in the PVC industry in recent years, which complaint counsel ascribes to the recent economic recession and to a slowdown in the PVC growth rate, and which respondents describe as brought about through forecasting errors on the part of numerous suppliers (Findings 241–44).

m. *Competitive performance in the PVC industry*. Although complaint counsel would ascribe little or no weight to this factor, respondents rely heavily upon evidence of prevailing competitive conditions in defense of the challenged acquisition (Findings 245–49).

VCM

The "additional considerations" respecting VCM are virtually the same as those respecting PVC, and similar findings have been made:

Entry into the VCM market is difficult and takes a long time because of the size of the minimum efficient scale plant (Findings 268–69); the magnitude of sunk costs (Findings 270–71); the required lead time (Findings 272–79); existing excess **[95]** capacity (Findings 280–81); and the extent of vertical integration (Finding 282). As in the case of PVC, VCM is physically fungible and therefore homogeneous (Findings 283–86); VCM elasticity of demand is low (Findings 287–89); VCM producers have similar production costs (Findings 290–95); reasonably reliable competitive price information is generally available (Findings 296–304); there are repeat sales to VCM customers by regular suppliers (Findings 305–308); VCM manufacturing is not characterized by rapid technological change (Findings 309–12); there is decreased growth in demand for VCM (Findings 313–16); there are price protection mechanisms in VCM sale contracts (Finding 317); complaint counsel's contentions regarding mutual interdependence among VCM producers are similar to those made with respect to PVC producers (Finding 318). In addition, complaint counsel points to alleged previous "collusive behavior" in the VCM industry (Findings 319–22), (the evidence concerning which I deem inconclusive). Counsel also relies upon the currently existing excess capacity in the VCM industry (Findings 323–26). Lastly, complaint counsel urges that little or no weight be ascribed to competitive performance in the VCM industry (Findings 327–331), a factor upon which respondents rely heavily in defending the legality of the challenged acquisition.

If I properly understand complaint counsel's position, if a sufficient number of the above-recited qualitative factors can be shown to be established in the record, then complaint counsel must prevail in this case. This is because the existence of these "additional considerations" in the PVC and VCM markets would manifest a climate for collusion among producers regarding the raising of prices or the restricting of output (see transcript of oral argument on proposed findings, p. 23–30).[59]

This, then, is the theory of law violation which I am urged to apply in setting aside the acquisition by Goodrich of the Diamond PVC/VCM assets for $125 million, on the grounds of reasonable probability of lessening competition.

I have much difficulty, however, in bringing myself to apply this theory to the facts of this case, in view of what the record shows concerning the state of competition in the PVC and VCM markets.

In this connection, the record shows that competition among producers is ongoing, vigorous and intense. This has been **[96]** conclusively demonstrated in a variety of ways: the activity of producers' sales forces; the extensive discounting; the attempts to obtain raw materials at lowest possible prices; the active monitoring of competitors' prices and meeting of competitive offers; the attempts to keep abreast of competitors' operating costs; the efforts to keep pace with changing technology. All of these factors and more are pervasive in the record.

While it may be conceivable that these factors can be related up to a "collusion" theory, it seems more reasonable to conclude that PVC and VCM suppliers have been, and indeed are, engaged in a spirited head to head contest for market share. This, I believe, to be the case both before and subsequent to the Goodrich acquisition.

The state of competition in the PVC and VCM markets being as it is, the adverse competitive effects required by Section 7 have not been established.

ORDER

I am thus constrained from entering the relief requested. Accordingly, dismissal of the complaint is hereby directed.

OPINION OF THE COMMISSION

BY CALVANI, *Commissioner:*

This case concerns an acquisition affecting the manufacture of polyvinyl chloride ("PVC") and vinyl chloride monomer ("VCM"). PVC is a thermoplastic resin that, when combined with other ingredients, can be used to produce a wide variety of plastic products, ranging from irrigation pipe to phonograph records.[1] VCM is a gaseous chemical that is an essential and primary input needed to manufacture

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[59] I understand that complaint counsel is not referring to collusion in the Sherman Act sense, which has been held to be an incorrect legal standard in a Clayton Section 7 case. Federal Trade Commission v. Warner Communications, Inc., 742 F.2d 1156, 1160 (9th Cir. 1984).

[1] A thermoplastic resin becomes soft and malleable when heated, and therefore can be fabricated by applying heat and pressure. By contrast, thermosetting plastics do not return to a malleable state upon reheating.

PVC resin. This case concerns an acquisition affecting the manufacture of both products. Respondent B.F. Goodrich ("Goodrich") is a large New York corporation, headquartered in Akron, Ohio, that manufactures a wide variety of chemicals, plastics, rubber and other products worldwide. In calendar 1980, Goodrich had net sales of $3.08 billion, net income of $61.7 million, and total assets valued at **[2]** $2.2 billion.[2] Respondent Diamond Shamrock ("Diamond") is a Delaware corporation, headquartered in Dallas, Texas, whose operations include natural gas and crude oil exploration and production; petroleum refining and marketing; coal, chemicals and plastics production; and technology development. In calendar 1980, Diamond Shamrock had revenues of $3.143 billion, net income of $201 million, and total assets valued at $2.8 billion. IDF 4.

In January 1982 Goodrich acquired Diamond's largest PVC plant, its VCM plant, and certain other assets for $125 million. IDF 11 *in camera*. The Federal Trade Commission simultaneously issued the administrative complaint in this matter.[3] The **[3]** complaint alleges that the acquisition violated Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. More particularly, the complaint alleges that the acquisition would eliminate actual competition between Goodrich and Diamond and increase concentration levels in two product markets: the bulk and suspension PVC market and the VCM market. Administrative Law Judge Howder dismissed the complaint with respect to both markets, because in his view "the record shows that competition among producers is ongoing, vigorous and intense." ID at 95.

As explained in detail below, the Commission has concluded that the acquisition may substantially lessen competition in the VCM market, but is unlikely to lessen competition substantially in the PVC market. Accordingly, the Commission affirms the decision of Judge Howder with respect to the PVC market, and reverses with respect to the VCM market. [5]

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[2] IDF 1. The following abbreviations are used in this opinion:

ID — initial decision page number
IDF — initial decision finding number
Tr. — transcript of testimony page number
CX — complaint counsel's exhibit number
CAB — complaint counsel's appeal brief
CRB — complaint counsel's reply brief
CPF — complaint counsel's proposed finding of fact number
CRF — complaint counsel's reply finding of fact number
RX — respondents' exhibit number
RAB — respondents' answering brief
RPF — respondents' proposed finding of fact number
RRF — respondents' reply finding of fact number

This opinion, and the opinions of Chairman Oliver and Commissioner Azcuenaga, contain some references to material in the *in camera* portion of the record. Pursuant to an order issued on February 8, 1988, the Commission has determined, without objection from the submitting parties, to place these references on the public record of this proceeding.

[3] PVC is currently the subject of another Commission proceeding. In April 1986 the Commission issued an administrative complaint challenging Occidental Petroleum's acquisition of two PVC plants from Tenneco Polymers. The Commission also sought a preliminary injunction against the transaction. The district court denied that application, but its decision was later vacated as moot. *FTC v. Occidental Petroleum Corp.*, 1986-1 Trade Cas. (CCH) ¶67,071 (D.D.C. April 29, 1986), *vacated as moot*, No. 86-5254 (D.C. Cir. Oct. 23, 1986).

I. STATEMENT OF FACTS

At the time of the acquisition, Goodrich operated bulk or suspension PVC facilities—with a total nameplate capacity of over one billion pounds per year—in Avon Lake, Ohio; Henry, Illinois; Long Beach, California; Louisville, Kentucky; Pedricktown, New Jersey; and Plaquemine, Louisiana. CX 4Z73. It also operated a VCM plant with a nameplate capacity of approximately one billion pounds per year in Calvert City, Kentucky. IDF 3 *in camera*. At the time of the acquisition, Diamond operated several bulk and suspension PVC facilities—with a total nameplate capacity of 590 million pounds per year—in Deer Park, Texas and Delaware City, Delaware. IDF 5 *in camera*. Its Deer Park facilities included several specialty PVC resin plants (plants numbers 1, 3, 4 and 4X), with a combined practical production capacity of 215 million pounds per year; one large commodity PVC resin plant (plant number 5), with a practical production capacity of 260 million pounds per year; and a powder compound plant, with a capacity of 152 million pounds per year. Diamond also operated a VCM facility with a nameplate capacity of one billion pounds per year at LaPorte, Texas, adjacent to its Deer Park facility.[4] [6]

In July 1979 Goodrich announced that it intended to double its PVC capacity by 1986.[5] In 1980, it announced that it would execute that strategy by constructing a 1.6 billion pound per year VCM plant and a 1.1 billion pound per year suspension PVC plant at Convent, Louisiana.[6] Goodrich privately described its plans in 1981 as a successful "preemptive" strategy designed to

> freeze the competition into inaction, thereby delaying expansions and forestalling new entrants into the business. . . . This preemptive strategy, reinforced by the 1980 recession, has been quite successful to date . . . No new expansions beyond 1983 have been announced by any competitor. New entries in PVC have been forestalled . . . We have also seen consolidation occurring within the industry . . . the Diamond Shamrock and Air Products PVC businesses are for sale. As a result of all of the above developments, as well as the industry perception of our commitment, we are in an excellent competi-

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[4] IDF 5-6 *in camera;* Goodrich Admissions 1, 15, 21, 23 (CX 4A, C-E); RX 320M, P; CX 11B *in camera.* The record indicates that Diamond continues to hold a fifty percent interest in a 220 million pound per year bulk PVC plant in Alberta, Canada. RX 320S-T.

[5] DiLiddo, Tr. 3335; CX 38C *in camera; see* CX 109D, Z4 *in camera.*

[6] DiLiddo, Tr. 3131, 3135–36, 3178–79; CX 8B; CX 38C *in camera.* A joint venture between Goodrich and Bechtel Petroleum was already constructing a chlor-alkali and ethylene dichloride complex at that same location; that facility was completed in 1981. CX 8B; Goodrich Admission 665 (CX 4Z62); DiLiddo, Tr. 3131; CX 38C *in camera.*

tive position to move ahead with our plans:[7]

These developments helped Diamond to conclude that its plastics business would not satisfy new corporate financial [7] targets; it also believed that selling the business would provide capital for expansion in other areas.[8] Diamond therefore organized its plastics business into a new subsidiary, Diamond Shamrock Plastics Corporation ("DSPC"). IDF 7. Several firms expressed interest, and between September 1980 and September 1981 Diamond negotiated most actively with [ ] firm. CPF 1.26 *in camera*. In August 1980 Diamond rejected a Goodrich proposal, in part because it believed that such an acquisition would present antitrust problems. However, Diamond subsequently changed its mind, and in August 1981 began negotiating actively with Goodrich.[9] Although Goodrich believed that Diamond duplicated rather than complemented its own PVC capabilities, with "only a suggestion of synergy," it viewed the acquisition as "an attractive defense against acquisition [of Diamond] by another PVC producer."[10]

In the course of their negotiations Goodrich and Diamond agreed that only Diamond's large commodity grade plant (number 5) would be directly transferred to Goodrich, while Diamond would retain the four Deer Park small reactor specialty PVC plants [8] (numbers 1, 3, 4 and 4X) and operate them for Goodrich.[11] At a meeting on September 9, 1981, Goodrich and Diamond discussed the shutdown of Diamond's remaining plants, and tentatively agreed that the Delaware City plant would be shut down as soon as possible, while the remaining Deer Park plants would be operated for "at least a year."[12] In late September 1981, Diamond and Goodrich reached an agreement in principle on the acquisition. Goodrich Admission 297 (CX 4Z12). In January 1982, Goodrich acquired Diamond's Deer Park plant number

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[7] CX 47B; *accord* CX 59D *in camera;* DiLiddo, Tr. 3170-74; CX 49R; CX 56A *in camera;* CX 57C-E *in camera.*

[8] CX 112G-H; CX 541F *in camera;* Diamond Admissions 294, 295, 297 (CX 6M); Becker, Tr. 1342-48; CX 401E; CX 402B; CX 403A-B.

[9] Schaefer, Tr. 1092-93, 1106-07; CX 295Z75-76 *in camera;* Arp, Tr. 3458, 3476.

[10] CX 34A *in camera; see* Klass, Tr. 4963 *in camera.* These statements suggest that the acquisition did not increase efficiency to a significant degree.

[11] CX 60A *in camera;* CX 197B *in camera.*

[12] CX 60A *in camera.* In a September 1981 internal memorandum, Goodrich outlined some of the terms of the transaction as follows:

> DS will operate DP small poly plant for BFG for two years with option to extend a third year. Upon 6 mos. notice BFG can terminate small poly operations DS & BFG will jointly develop a shutdown plan.

CX 115C, H *in camera.* Respondents argue that this document was "a summary of the key points of the negotiation," rather than a description of the agreement, and that Goodrich and Diamond did not agree that Deer Park plants 1 through 4X would utlimately be shut down. RRF at 14-16, *citing* DiLiddo, Tr. 3198; Schaefer, Tr. 1183; Becker, Tr. 1357-58. However, the document is dated September 11, 1981, and Diamond and Goodrich reached an agreement in principle in late September. In any event, the Delaware City plant was subsequently sold to Ethyl Corporation, rather than shut down. *See* page 10, *infra.*

5, its VCM plant, and certain other assets for $125 million.[13] Goodrich subsequently [9] cancelled its plan to build a VCM plant at Convent, Louisiana, and wrote off the $27 million it had thus far invested in the project as a loss.[14]

Goodrich and Diamond believed that the sale of Deer Park plant number 5 to Goodrich effectively precluded the sale of plants numbers 1, 3, 4 and 4X to another firm, and that these plants would be closed within two years.[15] However, Diamond agreed to toll needed raw materials from Goodrich and use the plants to supply specialty grades of suspension PVC resin for resale by Goodrich.[16] As a result, Goodrich was able to assume responsibility for supplying specialty resins to Diamond's customers.[17] After Goodrich established itself as the supplier for these accounts, and Diamond dissolved its PVC marketing [10] organization, Goodrich shifted the source of supply from plants 1, 3, 4 and 4X to one of its own plants. *See* CX 570B.

After the first year of the tolling arrangement, Goodrich determined to minimize Diamond's suspension PVC production as much as possible, but to continue to take all the suspension PVC Diamond produced until Diamond shut down the remaining Deer Park plants.[18] Goodrich perceived this strategy as

> the only option that keeps Diamond from being a disruptive force in the market place. Since they have no sales force, if we don't take their resin, they will be able to only sell the resin based on price and this could have a devastating effect on overall industry pricing.

CX 117A. In April 1982 Diamond sold its Delaware City PVC plant to Ethyl Corporation, and by December 1983 Diamond had closed or sold all its remaining PVC plants and disbanded its plastics division. IDF 14 *in camera.*

II. SECTION 7 OF THE CLAYTON ACT

Section 7 of the Clayton Act prohibits acquisitions that may substantially lessen competition or tend to create a monopoly; that is, that create a reasonable likelihood of anticompetitive effects.[19] As the Court of Appeals for the Seventh Circuit [11] indicated recently in affirming the Commission decision in *HCA*, the crucial question is

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[13] IDF 10-11 *in camera.* The other assets Goodrich acquired included Diamond's suspension PVC production technology and formulations; its suspension PVC and powder compound inventories; its PVC and VCM railcars; its research and development resources; and various patents. IDF 12 *in camera.* They also included Diamond's Deer Park powder compound plant, which had been used to supply compounded PVC resin to PVC pipe producers. CX 452. As a part of the sales agreement, Diamond also agreed to supply ethylene and chlorine feedstocks to Goodrich—and to manufacture suspension PVC for Goodrich using Goodrich VCM—on an interim basis. IDF 13 *in camera.*

[14] DiLiddo, Tr. 3187-88, 3396.

[15] Schaefer, CX 295 Z97 *in camera;* CX 115C *in camera; see* CX 117 *in camera.*

[16] Under most tolling arrangements, a firm agrees to manufacture product for another firm using raw materials supplied by the other firm. Kienholz, Tr. 845-46.

[17] *See* CX 567; CX 570B.

[18] Beginning in March 1982 Diamond sold over 90 percent of its PVC production to Goodrich, pursuant to the tolling agreement. CX 300Z10 *in camera;* CX 117A-B.

> whether the challenged acquisition is likely to hurt consumers, as by making it easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level . . . the ultimate issue is whether the challenged acquisition is likely to facilitate collusion . . . the worry is that [the acquisition] may enable the acquiring firm to cooperate (or cooperate better) with other leading competitors on reducing or limiting output, thereby pushing up the market price.[20]

The Court went on to point out:

> Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable . . . is called for.[21]

In short, if an acquisition creates an "appreciable danger" of [12] anticompetitive effects such as supracompetitive prices, then it violates section 7 of the Clayton Act.

III. RELEVANT MARKETS

The first step in determining whether a particular acquisition satisfies the foregoing standard is to delineate the relevant geographic and product markets.[22] As the Supreme Court has indicated,

> determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because . . . [s]ubstantiality can be determined only in terms of the market affected.[23] [13]

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[19] *Hospital Corporation of America*, 106 FTC 361, 464 (1985) (*hereinafter HCA*), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, _ U.S. _, No. 86–1492 (May 3, 1987); *Echlin Manufacturing Co.*, 105 FTC 410, 483 (1985); *B.A.T Industries, Ltd.*, 104 FTC 852, 919 (1984).

[20] *Hospital Corporation of America v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986), *cert. denied*, _ U.S. _, No. 86–1492 (May 3, 1987) (*hereinafter HCA v. FTC*); *accord*, *HCA*, 106 FTC at 477.

[21] *HCA v. FTC*, 807 FTC at 1389 (citation omitted); *accord*, *United States v. General Dynamics Corp.*, 415 U.S. 486, 505 (1974); *HCA*, 106 FTC at 499 ("actual anticompetitive effects need not be shown; an acquisition is unlawful if such an effect is reasonably probable").

[22] As the Commission has noted, one could arrive at relatively precise estimates of market power—without proceeding through the market definition-market structure paradigm—if one could measure "all relevant demand and supply elasticities." *Federal Trade Commission Statement Concerning Horizontal Mergers*, 2 Trade Reg. Rep. (CCH) ¶ 4516 (June 14, 1982) (*hereinafter FTC Statement*), at 6901–3. However, as the Commission has also noted, such evidence "is rarely, if ever, available, and is not readily susceptible to direct measurement." *Id. But see* Baker and Bresnahan, *The Gains From Merger or Collusion in Product-Differentiated Industries*, 33 J. Indus. Econ. 427 (1985) (direct assessment of market power through residual demand curve estimation).

[23] *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 593 (1957); *accord United States v. Marine Bancorporation*, 418 U.S. 602, 618 (1974); *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962); *Domed Stadium Hotel, Inc. v. Holiday Inn, Inc.* 732 F.2d 480, 491 (5th Cir. 1984); *Weyerhaeuser Co.*, 106 FTC 172, 274 (1985); *American Medical International*, 104 FTC 1, 190–191 (1984) (*hereinafter AMI*).

A. *Relevant Geographic Market*

Relevant geographic markets can be delineated by measuring cross elasticities of supply and demand; that is, by determining the degree to which—within a given period of time—price changes in one area will induce changes in the quantities of the relevant product demanded in and supplied from other areas, with all other factors affecting supply and demand held constant.[24] Thus, the Supreme Court has determined that

> [t]he area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates and to which buyers can practicably turn for supplies.[25]

Consistent with that position, the Commission has determined that "the relevant geographic market must be broad enough that buyers would be unable to switch to alternative sellers in sufficient numbers to defeat an exercise of market power by firms in the area."[26] Similarly, the Department of Justice has concluded that an area is probably a relevant geographic market if a firm or a group of colluding firms within the area could **[14]** "profitably impose a 'small but significant and nontransitory' increase in price"—in most contexts, a five percent increase lasting one year—without (1) inducing a significant number of buyers to shift to firms outside the area, or (2) inducing a significant number of sellers outside the area to begin selling inside the area.[27] It is often difficult to measure these effects directly, either by calculating cross-elasticities of supply and demand, or by calculating the degree to which firms within the area could in fact exercise market power.[28] Surrogates such as persistent price differences; price change differences; similarities or differences in price movements; impediments to trade, such as transportation costs that are high relative to product value; shipment patterns and transshipment levels; and industry perceptions therefore may be used.[29] Imports that could profitably enter the market within one year in **[15]** response to a "small but significant and nontransitory" price increase should also be included.[30]

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[24] *Weyerhaeuser Co.*, 106 FTC at 274; *Grand Union Co.*, 102 FTC 812, 1039–40 (1983); *Beatrice Foods Co.*, 101 FTC 733, 836 (1983) (Douglas, Commissioner, and Miller, Chairman, concurring); *FTC Statement*, ¶4516 at 6901–7.

[25] *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *accord United States v. Philadelphia National Bank*, 374 U.S. 321, 359 (1963).

[26] *HCA*, 106 FTC at 466.

[27] *Justice Department Merger Guidelines*, 2 Trade Reg. Rep. (CCH) ¶4490 *et seq.* (1984) (*hereinafter DOJ Guidelines*) at ¶¶2.11, 2.31.

[28] *But see* Scheffman and Spiller, *Geographic Market Definition Under the United States Department of Justice Merger Guidelines*, 30 J. L. & Econ. 123 (1987) (operationalizes *DOJ Guidelines* market definition algorithm by estimating residual demand elasticities).

[29] *United States v. General Dynamics Corp.*, 415 U.S. 486, 490–91 and n.3 (1974); *Grand Union Co.*, 102 FTC at 1041; *FTC Statement*, ¶4516 at 6901–7; *DOJ Guidelines* at ¶2.32.

In this case, the parties have stipulated that the United States as a whole is the relevant geographic market (IDF 15), a delineation that is consistent with the record evidence.

B. *Relevant Product Market*

A relevant product market can also be delineated by measuring cross-elasticities of supply and demand; that is, by determining the degree to which—within a given period of time—changes in the price of a given product or service will induce changes in the quantities of a second product or service that are demanded or supplied.[31] Thus, the Supreme Court has concluded that both demand and supply substitutability are relevant to determining the contours of a relevant product market.[32] **[16]** Consistent with that position, the Commission seeks "to define a product or group of products sufficiently distinct that buyers could not defeat an attempted exercise of market power on the part of sellers of those products by shifting purchases to still different products."[33] Similarly, the Justice Department has concluded that a given item constitutes a relevant product if its manufacturer could "profitably impose a 'small but significant and nontransitory' increase in price"—in most contexts, a five percent increase lasting one year—without (1) inducing a significant number of buyers to begin purchasing substitute products, or (2) inducing a significant number of manufacturers of other products to begin producing the product at issue.[34] It is often difficult to measure these effects directly, either by calculating cross-elasticities of supply and demand, or by calculating the degree to which firms within the postulated product market could in fact exercise market power. Surrogates such as distinctive uses or characteristics, industry firm perceptions, and persistent price differences over time may therefore be considered.[35] **[17]**

1. Bulk and Suspension Polyvinyl Chloride

PVC is manufactured from ethylene, a petroleum compound, and chlorine.[36] These chemicals are first converted into ethylene dichlo-

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[30] *See, e.g., HCA*, 106 FTC at 466–467. On the other hand, imports that could profitably enter the market within twelve months to two years are treated as new entry under the DOJ Guidelines. *DOJ Guidelines* at ¶ 3.3. Here, in view of the parties' stipulation that the United States constitutes the relevant geographic market, we consider respondents' arguments concerning the impact of imports in our analysis of entry conditions. *See* pages 36–38, 42–43, *infra*.

[31] *Grand Union Co.*, 102 FTC at 1039–40; *Beatrice Foods Co.*, 101 FTC at 830 (Douglas, Commissioner, and Miller, Chairman, concurring); *FTC Statement*, ¶ 4516 at 6901–6.

[32] *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 and n.42 (1962); *United States v. Columbia Steel Corp.*, 334 U.S. 495, 510–511 (1948); *see also United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956).

[33] *HCA*, 106 FTC at 464, 466.

[34] *DOJ Guidelines* at ¶2.11.

[35] *Grand Union Co.*, 102 FTC at 1041; *FTC Statement*, ¶4516 at 6901–6 through 6901–7; *DOJ Guidelines* at ¶2.12.

[36] Chlorine is produced by applying an electrical current to brine; the process yields one pound of chlorine to 1.1 pounds of caustic soda. Chlorine is highly volatile and corrosive, and therefore cannot be stored economically.

(footnote cont'd)

ride, which is then "cracked" to produce vinyl chloride monomer ("VCM"). VCM molecules are then linked into chains ("polymerized") by heating them in the presence of certain catalysts. IDF 17, 19. Approximately 85 percent of all PVC manufactured in the United States is classified as "suspension PVC." IDF 21; Disch, Tr. 627–28. It is produced by adding suspension agents to VCM, in the presence of water and catalysts, thereby producing large PVC particles while using smaller amounts of energy than other processes require. IDF 21; Disch, Tr. 627–29. Approximately 5 percent of all PVC manufactured in the United States is classified as "bulk PVC." It is produced by polymerizing VCM without adding any liquids, producing a purer product suitable for end use applications requiring greater optical clarity, such as packaging materials.[37] [18]

When combined with other ingredients, such as stabilizers, plasticizers or impact modifiers,[38] PVC resin can be used to manufacture a wide variety of products, including pipe and pipe fittings, wire and cable insulation, packaging film for meat and produce, vinyl siding, floor tile, bottles, medical and surgical tubing, records, and vinyl window frame components. IDF 18 *in camera*. In 1981, approximately 5.242 billion pounds of PVC were produced for domestic consumption; by 1983 that total had increased to 5.635 billion pounds.[39] During the 1981–1983 period, approximately 43 to 44 percent of total PVC resin consumed was used to produce pipe and pipe fittings;[40] 20 to 25 [19] percent was used to produce calendered products;[41] 10 percent was used in wire and cable applications (IDF 147); and 6 to 7 percent was used for packaging film and sheet.[42]

RPF 45, 46. Ethylene is manufactured by cracking petroleum feedstocks such as ethane, propane, butane or naptha. RPF 49.

[37] IDF 23; Disch Tr. 629, 633. The remaining 8 to 10 percent of PVC manufactured in the United States is produced through a "dispersion process," in which emulsifying agents are used, in conjunction with an expensive spray drying process, to produce very small PVC particles. IDF 22; Disch, Tr. 630. The complaint also alleged a violation in the dispersion PVC market, but complaint counsel elected not to pursue—and presented no evidence concerning—that allegation at trial. ID at 2 n.2. Bulk and suspension PVC resins have "quite different" applications than dispersion resins. Disch, Tr. 634. In order to simplify the discussion, the term "PVC" in this opinion refers to bulk and suspension PVC, and not to dispersion PVC.

[38] These ingredients are added to PVC resins to produce PVC compounds, which are used in turn to manufacture PVC end use products. Disch, Tr. 655–58.

[39] *See* Tables I and II, *infra*.

[40] IDF 99; Disch, Tr. 663. This end use includes municipal water pipe (200 million pounds of PVC resin in 1983); rural water pipe (340 million pounds); water services and distribution pipe (260 million pounds); sewer and drain pipe (480 million pounds); drain, waste and vent pipe (450 million pounds); irrigation pipe (150 million pounds); communications duct (280 million pounds); and electrical conduit (120 million pounds). IDF 109, 121, 123, 127, 133, 138, 142, 144 (amounts *in camera*).

[41] IDF 190. Calendered products are produced through "calendering," in which large heated rolls are used to produce wide sheets of PVC material. Rigid calendered sheet is used to manufacture rigid products such as decorative laminates and credit card stock. Flexible calendered sheet is used to manufacture more flexible products such as wall coverings, upholstery, automotive interiors and landau tops, luggage, wallets, raincoats, footwear, and a variety of other products. IDF 190 and ID at 58 n.40.

[42] IDF 152. The remaining approximate percentages of the total over the 1981–1983 period were devoted to vinyl siding and accessories (5 percent); floor tile (3–4 percent); bottles (3–4 percent); medical applications (2 percent); phonograph records (2–3 percent); and windows (1 percent). IDF 154, 165, 169, 179 (and Table I), 185, 189 (and Table I) (percentages *in camera*); Disch, Tr. 664.

The parties have stipulated that the production of bulk and suspension PVC is a relevant product market (IDF 16), a delineation that is consistent with the record evidence. Firms that currently purchase PVC resin to manufacture PVC end use products cannot substitute other inputs in response to a small increase in PVC resin prices; there are simply no substitutes for PVC resin as an input to produce these products.[43] Moreover, firms producing other products are unlikely to switch to producing PVC in response to a small increase in PVC resin prices, because the machinery needed to produce PVC is **[20]** essentially unique to that application. *See* Disch, Tr. 663.

2. Vinyl Chloride Monomer

VCM is a "gaseous, reactive, acyclic intermediate chemical" under atmospheric temperature and pressure.[44] It is produced by thermally cracking purified ethylene dichloride at high temperatures. Ethylene dichloride is produced, in turn, by either oxyhydrochlorinating or directly chlorinating ethylene. IDF 32; Kienholz, Tr. 757–58. Approximately 0.6 pounds of chlorine and 0.49 pounds of ethylene are used to manufacture one pound of VCM. CPF 2.18 *in camera;* RPF 41 *in camera.* Small amounts of VCM are used to produce other plastics, but over 95 percent of the VCM consumed in the United States is used to manufacture PVC. IDF 31. Approximately 1.02 to 1.04 pounds of VCM are required to manufacture one pound of PVC. Kaserman, Tr. 2456. A substantial amount of processing—accounting for approximately 37 to 45 percent of the cost of producing PVC—is required to convert VCM into PVC.[45] In 1981, 6.856 billion pounds of VCM were produced for domestic consumption; by 1983 that total had increased to 7.033 billion pounds.[46]

Complaint counsel argue—and Judge Howder agreed—that VCM constitutes a relevant product market. IDF 16; CAB at 7 and **[21]** n. 11; CRB at 53–56. Respondents agree that "VCM is a product without substitutes, produced by distinct companies utilizing unique facilities." RPF 228 *in camera.* They argue, however, that VCM is not a relevant market "that could be subject to the exercise of market power" because VCM's only utility is in the manufacture of PVC and because VCM is "virtually fully integrated" into PVC by ownership or long term contracts. As a result, according to the respondents, "VCM and PVC producers are engaged in a single business, with the price of PVC determining revenues for all participants."[47]

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[43] There are, of course, substitutes for the end products made from PVC resin. They are discussed in detail in Part IV.C.2.a., *infra.*

[44] IDF 30. VCM is normally stored and transported as a liquid under pressure. L. Wheeler, Tr. 917.

[45] *See, e.g.,* RX 1213H *in camera.*

[46] *See* Tables IV and V, *infra.*

[47] RAB at 57. However, the respondents' economic expert testified that VCM "may likely meet" the *DOJ Guidelines* criteria for a market "and thus is a market definition concept that I can work with." Klass, Tr. 4473–74.

We conclude that VCM is a relevant product market for the purpose of Section 7 analysis. Even if the respondents' analysis were to apply if VCM and PVC were completely integrated, the record shows that the degree of vertical integration by ownership between VCM and PVC is neither complete nor symmetrical. IDF 78. Before the Goodrich acquisition, nonintegrated producers accounted for 46.9 percent of VCM practical production capacity and approximately 44.6 percent of PVC practical production capacity.[48] Accordingly, there is a market in which VCM is bought and sold that could be subject to the exercise of market **[22]** power. The long term VCM supply contracts to which the respondents refer typically give the firms they cover independent discretion as to the quantity they will buy or sell, and their customers and sources of supply.[49] Moreover, under most VCM supply contracts, neither the price nor the quantity is fixed; instead, both are subject to negotiation on a frequent basis. In addition, contract prices are often closely tied to VCM market prices by meeting competition clauses or specific references to competitors' VCM prices. Furthermore, even firms that are vertically integrated by ownership participate in the VCM market from time to time as either buyers or sellers of VCM, through sales, purchases and exchanges keyed to the market price of VCM. IDF 296–301 *in camera*.

From the perspective of the demand and supply elasticity analysis outlined above, the Commission therefore has concluded that VCM should be classified as a separate product market. A small increase in VCM prices is not likely to induce a significant increase in the quantity of a competing product that is demanded, because there are no substitutes for VCM, which must be used in fixed proportions to produce PVC.[50] In fact, one Goodrich document describes demand for VCM as "absolutely **[23]** inelastic."[51] Moreover, a small increase in VCM prices is not likely to induce producers of other products to switch to supplying VCM; no plants currently producing other products could be shifted into VCM production.[52] Thus, a group of colluding firms in the VCM market could sustain a price increase of at least five percent for at least one year.

As noted *supra*, a number of PVC producers—including Goodrich and Diamond at the time of the acquisition—also produce VCM. The Commission has determined that "captive production" of this type

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[48] *See* Table VII, *infra*. In *Weyerhaeuser Co.*, 106 FTC 172, 271 (1985), the Commission found that corrugating medium was a relevant product market, even though only 12 percent of corrugating medium consumed was sold on the open market.

[49] For example, under a contract between Shell and Tenneco, Tenneco may resell any or all of the VCM it purchases from Shell; Shell may sell VCM to other firms; Tenneco may buy VCM from other firms; and Shell controls the factors that determine contract prices. Disch, Tr. 703–04, 726–27.

[50] Kaserman, Tr. 2456; L. Wheeler, Tr. 919 *in camera*.

[51] Lefebvre, CX 296Z *in camera*.

[52] Klass, Tr. 4706–07; Kaserman, Tr. 2455–56; Kienholz, Tr. 821; L. Wheeler, Tr. 990.

> should ordinarily be treated as part of the relevant product market in merger cases when, as the Justice Department has suggested, a "small but significant and nontransitory" price increase is likely to induce vertically integrated firms to increase production of the relevant product, either for outside sales or to increase their own downstream sales.[53]

Under this standard, internally consumed VCM should be treated as part of the VCM market. Integrated VCM producers could respond to VCM price increases initiated by nonintegrated producers by [**24**] increasing VCM production, either for sale or for producing additional quantities of PVC.[54] VCM producers consider both independent and integrated VCM producers to be competitors in supplying PVC producers, and PVC producers secure VCM from both integrated and nonintegrated sources.[55] Any effort among nonintegrated VCM producers to collude could not succeed without the cooperation or acquiescence of integrated producers.[56]

IV. STRUCTURAL FACTORS

The foregoing discussion establishes that the PVC market and the VCM market are relevant product markets, and that the United States is the relevant geographic market. The next step is to determine whether the acquisition at issue may substantially lessen competition by facilitating collusive conduct (or other anticompetitive behavior) among the firms remaining in the industry. As the Commission has stated, the legal analysis of horizontal mergers " 'has focused on the extent to which the mergers . . . enhance the ability of firms to collude, either [**25**] expressly or tacitly.' "[57] The Seventh Circuit has confirmed that the issue is

> whether the challenged acquisition is likely to facilitate collusion . . . the worry is that [the acquisition] may enable the acquiring firm to cooperate (or cooperate better) with other leading competitors in reducing or limiting output, thereby pushing up the market price.

HCA v. FTC, 807 F.2d at 1386.

The effective coordination of price and output strategies requires developing a consensus concerning price and output levels, and a means of enforcing its terms.[58] The first step requires harmonizing the incentives of participating firms and mitigating firm uncertainty concerning rival firms, so that they can effectively coordinate their behavior.[59] The second step requires creating circumstances in which the prospective value to each participating firm of cheating on the consensus does not **[26]** exceed the prospective loss from rival firm retaliation.[60] In order to create and maintain these circumstances, participating firms must be able to monitor rival firm conduct; that is, they must be able to detect cheating on the consensus. They must also be able to retaliate effectively if and when cheating occurs.

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[53] *B.A.T Industries, Ltd.*, 104 FTC at 934, *citing DOJ Guidelines* at ¶2.23; *accord Spectrofuge Corp. v. Beckman Instruments, Inc.* 575 F.2d 256, 278 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *International Tel. & Tel. v. General Tel. & Elecs. Corp.*, 518 F.2d 913, 930 (9th Cir. 1975). *But see Grumman Corp. v. LTV Corp.*, 665 F.2d 10, 13–14 (2d Cir. 1981).

[54] Kaserman, Tr. 2456–59.

[55] L. Wheeler, Tr. 932 *in camera*; Kienholz, Tr. 786, 856–57; Klass, Tr. 3998, 4008; Taylor, Tr. 1563–65, 1623.

[56] Kaserman, Tr. 2458–59; *see* Klass, Tr. 4049–52.

[57] *Weyerhaeuser Co.*, 106 FTC at 273–274, *quoting FTC Statement*, ¶4516 at 6901–2. This case does not involve the alternative situation in which an acquisition permits a single firm to acquire or enhance market power approaching monopoly proportions.

Structural conditions within an industry are crucially important to determining the feasibility of collusion, and consequently to determining whether a particular merger or acquisition is likely to have anticompetitive effects. An industry in which an acquisition is most likely to have anticompetitive effects will be characterized by the following attributes: (1) relatively high barriers or impediments to entry; (2) a relatively high level of concentration; (3) a low level of product differentiation, and a low level of geographic differentiation occasioned by transportation cost differences; (4) a relatively inelastic demand for industry output at competitive price levels; (5) insignificant intra-industry differences in cost functions; (6) a large number of small buyers; (7) a high degree of transaction frequency and visibility; and (8) relatively stable and predictable demand and supply conditions.[61] Not all of these criteria need to be **[27]** satisfied in order to establish that an acquisition may substantially lessen competition, but they are all relevant to one degree or another. This part of the Opinion analyzes each of these factors in detail. In addition, it evaluates the competitive significance of vertical integration between the VCM and PVC markets.

A. BARRIERS AND IMPEDIMENTS TO ENTRY

The absence of barriers or impediments to entry makes it highly unlikely that a merger or acquisition will have anticompetitive effects, because any effort to extract supracompetitive prices and profits will induce new entry, which will reduce prices to competitive levels. Even if new entrants are willing to participate in an ongoing effort to coordinate price and output levels, accommodating their conflicting incentives is likely to be difficult. The Supreme Court has therefore recognized that an evaluation of the likely competitive effects of an acquisition should include an appraisal of the potential for competition from firms not currently in the relevant market. For example, in *United States v. Falstaff* **[28]** *Brewing Corp.*, the Court noted that although Falstaff did not currently sell the relevant product in the relevant geographic market, it clearly possessed the potential to enter relatively easily, and therefore constrained the pricing discretion of incumbent firms.[62]

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[58] *See, e.g.*, R. Posner, *Antitrust Law: An Economic Perspective* 51 (1976); Salop, *Practices That (Credibly) Facilitate Oligopoly Coordination*, in *New Developments In the Analysis of Market Structure* (J. Stiglitz and G. F. Mathewson eds. 1986); Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 Cornell L. Rev. 439, 445 (1982); Clark, *Price-Fixing Without Collusion: An Economic Analysis of Facilitating Practices After Ethyl Corp.*, 1983 Wis. L. Rev. 887, 891 (1983).

[59] *E.g.*, Clark, *supra* note 58, at 892.

[60] *E.g.*, *id.* at 893.

[61] *See, e.g.*, *Ethyl Corp.*, 101 FTC 425, 602–03, 607–09 (1983), *rev'd on other grounds sub nom. E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984); *FTC Statement* ¶4516 at 6901 through 6901–5; *DOJ Guidelines* at ¶3.2; Posner, *supra* note 58, at 55–61; P. Areeda, *Antitrust Analysis* ¶262 (1981); F. Scherer, *Industrial Market Structure and Economic Performance* 171–72 (2d ed. 1980); G. Stigler, *The Organization of Industry* 39–45 (1968); Markham, *The Nature and Significance of Price Leadership*, 41 Amer. Econ. Rev. 891, 901–03 (1951); Clark, *supra* note 58, at 894–99. *See generally United States v. Citizens & Southern National Bank*, 422 U.S. 86, 120–22 (1975); *United States v. General Dynamics Corp.*, 415 U.S. 486, 503–05 (1974).

For similar reasons, the Commission has concluded that in the absence of barriers or impediments to entry, an acquisition cannot have anticompetitive effects, and therefore cannot violate Section 7 of the Clayton Act.[63] The Justice Department has taken the same position:

> If entry into a market is so easy that existing competitors could not succeed in raising price for any significant period of time, the Department is unlikely to challenge mergers in that market. **[29]** *DOJ Guidelines* at ¶3.3. By contrast, high entry barriers "increase the probability that market power will result from an acquisition."[64] The Commission has defined entry barriers as additional long-run costs that must be incurred by an entrant, but that were not incurred by incumbent firms.[65] The Commission has noted that a long-run cost differential could create "a permanent barrier to new entry" that would permit incumbent firms to secure supracompetitive prices and profits indefinitely.[66] Governmental restrictions may create such a barrier,[67] and environmental regulations represent an example.[68] The Commission has determined that the relevant costs for comparison purposes **[30]** are the "economic costs measured at the time of entry;" that is, the costs that each firm—whether an incumbent or a

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[62] *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 531–34 (1973); *accord FTC v. Procter & Gamble Co.*, 386 U.S. 568, 581 (1967); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 173–74 (1964); *see also United States v. Philadelphia National Bank*, 374 U.S. at 367 and n. 44.

[63] *Echlin Manufacturing Co.*, 105 FTC at 484, 487; *accord United States v. Waste Management, Inc.*, 743 F.2d 976, 981–984 (2d Cir. 1984); *United States v. Calmar Inc.*, 612 F. Supp. 1298, 1305 (D.N.J. 1985); *United States v. Tracinda Investment Corp.*, 477 F. Supp. 1093, 1108 (C.D. Cal. 1979); *United States v. M.P.M., Inc.*, 397 F. Supp. 78, 92, 94 (D. Colo. 1975); *HCA*, 106 FTC at 489; *FTC Statement*, ¶ 4516 at 6901–3 ("if entry barriers are very low it is unlikely that market power, whether individually or collectively exercised, will persist for long."); *see B.A.T Industries, Ltd.*, 104 FTC at 919; *Grand Union Co.*, 102 FTC at 1063. Hence, in evaluating the prospect of anticompetitive effects from a particular acquisition, the Commission must first determine whether any barriers or impediments to entry make the sustained exercise of market power feasible.

[64] *Grand Union Co.*, 102 FTC at 1063–64; *accord FTC Statement*, ¶4516 at 6901–3.

[65] *Echlin Manufacturing Co.*, 105 FTC at 485, *citing, e.g.*, G. Stigler, *supra* note 61 at 67; *accord HCA*, 106 FTC at 491; *Weyerhaeuser Co.*, 106 FTC at 286. In the rest of this opinion, the term "barriers to entry" is intended to refer to "Stiglerian" barriers to entry.

[66] *Echlin Manufacturing Co.*, 105 FTC at 485–86.

[67] For example, in *HCA* the Commission noted that both Georgia and Tennessee required prospective or incumbent hospitals to secure "certificates of need" from their respective States before, *inter alia*, establishing new acute care hospitals, expanding the bed capacity of existing hospitals, changing the services they offered, or making significant capital expenditures. *HCA*, 106 FTC at 489–91. Securing these certificates required following elaborate, time-consuming procedures, and the Commission concluded that these procedures represented a classic barrier to entry. *Id.* at 491.

[68] *Weyerhaeuser Co.*, 106 FTC at 287.

prospective entrant—confronts at the time of its entry effort.[69]

Impediments to entry that do not rise to the level of absolute barriers to entry may nevertheless permit the exercise of market power for substantial periods of time. The Commission has defined impediments to entry as

> any condition that necessarily delays entry into a market for a significant period of time and thus allows market power to be exercised in the interim.[70]

The Commission has more recently indicated that when new entry is possible only through the construction of a plant that cannot be completed in less than four to four and one half years, that constitutes an impediment to entry.[71] The nature of sales **[31]** contracts within an industry helps to determine the significance of the delay arising from impediments to entry. If most prices are fixed pursuant to contracts with terms longer than the delay occasioned by impediments to entry, then the impediments may have no competitive significance.

As the time and expenditures needed to overcome barriers and impediments to entry increase, the likelihood that a given acquisition will have anticompetitive effects, *ceteris paribus,* increases as well. In this case, both the PVC and the VCM markets are characterized by substantial barriers and impediments to entry, and fringe firms are unlikely to constrain collusive conduct in either market.

1. PVC Market

Under current conditions, four or five years would be required to plan and construct a new bulk or suspension PVC plant, or to expand an existing plant,[72] including one to two years for required environmental permits;[73] at least six months **[32]** for pre-permit engineering;[74] and two years for actual construction. IDF 65-67; Schaefer, Tr. 1133. Additional time—up to one year—may be needed for prospective entrants to evaluate and secure the technology licenses needed to begin PVC production.[75] Because these factors necessarily delay entry into the PVC market for a substantial period of time, they constitute a substantial impediment to entry. Moreover, because some of the environmental regulations were adopted recently —and have significantly increased the length of time required to enter the PVC market—they constitute a significant barrier to entry.

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[69] *Echlin Manufacturing Co.,* 105 FTC at 486. The fact that an incumbent firm confronts lower costs than a prospective entrant at the time the latter firm attempts to enter is not necessarily relevant. The incumbent's lower current costs may simply represent compensation for the risks it overcame when it entered. *Id.*

[70] *Id.* at 486; *accord Weyerhaeuser Co.,* 106 FTC at 286-87. The economic literature on "strategic entry deterrence" suggests that practices that fall within this characterization may also impede entry. *See generally* Salop, *Strategic Entry Deterrence,* 79 Am. Econ. Rev. 335 (Papers and Proceedings) (1979).

[71] *Weyerhaeuser Co.,* 106 FTC at 287. The Commission found that greenfield entry would require four to four-and-one-half years per plant from beginning to end, including the time required for plant development, site selection, design work, applications for environmental permits, and actual construction. *Id.* Nine recent plant expansions in the relevant market indicated, however, that "existing facilities [could] be upgraded fairly easily, and at relatively low cost." *Id.* at 287-88. The Commission therefore concluded that the consequent "possibility of expanded output by fringe firms" limited "the possibility of anticompetitive behavior." *Id.* at 289. In this case, by contrast, barriers and impediments to both greenfield entry and incumbent plant expansion are high.

[72] IDF 64; CX 15A; CX 16B-Z10 *in camera;* CX 196A *in camera;* CX 439B; CX 446C; *see* Disch, Tr. 653 (3-4 years).

[73] Schaefer, Tr. 1133; CX 38V *in camera;* CX 506B, 592 *in camera;* IDF 66.

[74] DiLiddo, Tr. 3337; IDF 67.

The environmental restrictions constrain both new entry and expansion by incumbent firms. Air emissions from PVC and VCM plants are subject to a number of air quality restrictions created pursuant to the Clean Air Act, 42 U.S.C. 7401–7642, including specific standards covering vinyl chloride emissions.[76] Therefore, preconstruction permits must be obtained for all new [33] PVC plants, and for major expansions of existing plants, certifying that they will comply with a variety of "Prevention of Serious Deterioration" ("PSD") regulations.[77] The PSD regulations are relatively restrictive in areas that currently meet federal air quality standards—requiring, *inter alia*, preconstruction permits[78]—and even more restrictive in areas that do not currently meet those standards.[79] Moreover, in 1980 EPA amended its PSD regulations to require the presentation of continuous air monitoring data *prior* to the processing of a permit application. Diamond estimated that this requirement

> could add up to one year to the time it takes to get a construction permit. This means it will take from one to two years to get a PSD Permit before construction can begin.

CX 446D. Tenneco similarly estimated that one year of ambient air quality monitoring would probably be required before the submission of a preconstruction permit application. CX 574J.

In addition, effluent discharges from VCM and PVC resin plants are subject to the restrictions of the Clean Water Act, as amended by the Federal Water Pollution Control Act, 33 U.S.C. 1251–1376. The EPA has specifically designated vinyl chloride as a toxic pollutant, 33 U.S.C. 1317; 40 C.F.R. 401.15, and [34] PVC plants as pollutant discharge point sources.[80] As a result, new and existing PVC manufacturing facilities must comply with the permit requirements of the National Pollutant Discharge Elimination System. 33 U.S.C. 1342.

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[75] Disch, Tr. 645–47; Schaefer, Tr. 1133; IDF 69.

[76] *National Emissions Standard for Vinyl Chloride*, 40 C.F.R. §§ 61.60–61.68, promulgated pursuant to the *National Emission Standard for Hazardous Air Pollutants*, 42 U.S.C. § 7412. Vinyl chloride has been specifically designated as an environmental pollutant; as a result, in 1976 the Environmental Protection Agency promulgated a standard to reduce atmospheric VCM emissions. In 1975, the Occupational Health and Safety Administration determined that VCM is a highly specific cause of liver cancer, and therefore promulgated a standard to reduce worker exposure to residual VCM. Disch, Tr. 649; Kienholz, Tr. 755.

[77] *Prevention of Significant Deterioration*, 40 C.F.R. §§ 51.24(b)(23), 52.21(b)(23).

[78] 42 U.S.C. §§ 7407, 7475; 40 C.F.R. §§ 51.24, 52.21.

[79] 42 U.S.C. §§ 7501–7508; 40 C.F.R. § 52.24.

[80] 33 U.S.C. § 1316(B)(1)(A); *see* 40 C.F.R. §§ 401.12, 416.10–416.15.

PVC plants may also be subject to a variety of local regulations such as land use restrictions. IDF 66; ID at 18 n.13.

These requirements have significantly lengthened the lead time and increased the risk associated with new plant construction and plant expansion since 1976. In one internal document, Goodrich noted:

> Complicating the development and implementation of new processes is the long lead time required for plant expansions and constructing grass root PVC plants. *This is now four to five years vs. the three years formerly required* due to the increasing number of local and federal restrictions and necessary approvals. The result is R&D's time table to freeze a plant design is drastically shortened . . . By-passing stages in process development to meet the shorter time tables will significantly increase the risks of long costly plant start-ups and not meeting planned capacity goals.[81]

Recent plant construction efforts confirm these assessments. For example, Formosa—which already had access to the production technology it needed—began a new PVC/VCM plant **[35]** construction effort in the latter part of 1978, and was not able to start operating the new facility until December, 1982. IDF 70; ID at 20 n. 15. When Goodrich began its never-completed Convent, Louisiana suspension PVC plant project in July 1979, it had already spent eight months conducting an extensive PVC/VCM strategy and site selection study, and did not expect to bring the plant onstream until the third quarter of 1983. IDF 71. Similarly, in 1981 Diamond projected the lead time for a new suspension PVC plant at Deer Park, using its own technology, to be four to five years "from concept to startup." IDF 72

In short, newly adopted environmental restrictions may be characterized as a barrier to entry into the PVC market. They substantially slow both the construction of new capacity and the expansion of existing capacity, and represent a new cost that incumbent firms did not have to bear. Some expansion of existing facilities by large incumbent firms has occurred since 1970. However, expansion usually constrains the pricing discretion of incumbent firms only if it is undertaken by a fringe firm that is not likely to be a party to a collusive arrangement.[82] The number of firms that may be characterized as "fringe" PVC producers has been declining steadily. As Tables I and II indicate, in addition to Diamond Shamrock, three fringe firms—Stauffer Chemical, Talleyrand Chemicals, and Great American Chemical—left the PVC market between 1981 and 1983. **[36]**

Goodrich and other incumbent firms have on a number of occasions recognized that entry into the PVC market is difficult. In one internal assessment, Goodrich concluded that "[r]elatively high barriers to entry should prevent a large number [of] expansions or new entries."[83] Actual entry experience supports this view; no *de novo* entry has occurred since 1975.[84] Mr. Disch of Tenneco testified that he did not expect any new entrants into the PVC market over the next three or four years.[85] **[37]**

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[81] CX 196A *in camera* (emphasis added); *accord* CX 14F *in camera* ("Building permits are being delayed by government regulations, causing longer lead times and/or higher RISKS to build new plants.").

[82] *Weyerhaeuser Co.*, 106 FTC at 287–88 and n.69.

Of course, PVC imports are not constrained by domestic environmental restrictions, and they have increased to some degree over the last few years. In 1977, imports represented only 0.6 percent of U.S. bulk and suspension PVC consumption; in 1984 they accounted for approximately 4 percent of that total.[86] Much of the increase in imports, however, appears to be attributable to extraordinary events affecting domestic PVC supply and currency exchange rates. The dollar increased in value by 66 percent between the third quarter of 1980 and the third quarter of 1984,[87] producing, *ceteris paribus*, a 66 percent increase in domestic PVC prices, in comparison with foreign PVC prices. Even if these exchange fluctuation effects are not considered, domestic prices increased considerably more during the last part of that period than the 5 percent increase that is usually applied to define the relevant market, because freezing weather conditions during the 1983–1984 winter forced several domestic PVC plants to shut down.[88] Thus, imports are a small **[38]** proportion of domestic PVC consumption and, absent extraordinary conditions, do not appear to constrain domestic prices.

In addition, PVC imports manufactured by domestic producers in other countries are unlikely to constrain collusion among those same domestic producers. Canada and Mexico are the principal sources of PVC imports.[89] Goodrich is the largest PVC producer in Canada,[90] and is a major PVC producer in Mexico.[91] Furthermore, PVC imports from overseas countries must be transported over water in bags, rather than in rail tank cars, at a cost disadvantage—relative to North American PVC—of three to seven cents per pound. H. Wheeler, Tr. 1776–77. This is a substantial disadvantage; three cents per pound represents 9 to 18 percent of the average selling price of "general purpose PVC resin"—17 cents to 35 cents per pound—during the 1981–1983 period. *See* note 179 *infra*. For all of these reasons, we conclude that PVC imports do not significantly constrain domestic pricing discretion.

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[83] CX 199Z76; *accord* CX 199Z82; CX 248E *in camera.*

[84] Kaserman, Tr. 2341–44; CX 664G, W *in camera.* Respondents argue that Formosa entered in 1974, "exited and then reentered in 1981" (RAB at 53), but Formosa's efforts are more akin to an expansion than to *de novo* entry.

[85] Disch, Tr. 692–93. At least two other factors may impede efforts to enter the PVC market to some degree. First, an entry effort at minimum efficient scale would apparently require at least 300 million pounds of annual production capacity, at a cost of $100 million. IDF 60; Schaefer, Tr. 1211–12; Diamond Admission 450 (CX 6S). In 1981 that represented 5.8 percent of total PVC production in the United States. *See* Table I, *infra.* It would be difficult to secure that percentage of total market sales without provoking a price response from incumbent firms. *See* Salop, *Measuring Ease of Entry*, 31 Antitrust Bulletin 551 (1986).

Second, sunk costs may represent an impediment to new entry. IDF 63; *see* IDF 73–75. PVC plants are suitable only for manufacturing PVC, and investing in such a plant therefore entails the risk of losing the entire investment. One might ordinarily conclude that incumbent firms faced precisely the same risks when they entered the PVC industry. However, Goodrich believed that its "preemptive strategy" heightened the risks associated with expansion or new entry into the PVC market. *See* CX 47B; CX 59D *in camera; see generally* Salop, *supra* note 70.

[86] RAB at 33 (240 million pounds is 4 percent of estimated domestic consumption of 5.635 billion pounds (*see* Table II, *infra*) in 1983).

[87] *Compare* CX 776E *with* CX 777E. The value of the dollar against other currencies—as measured by the Federal Reserve Board's index of weighted average exchange value—has more recently declined, producing the opposite effect, and making import prices less attractive relative to domestic prices.

[88] Kaserman, Tr. 2249–50; L. Wheeler, Tr. 986–89; DiLiddo, Tr. 3380–81; H. Wheeler, Tr. 1775–76.

[89] Kaserman, Tr. 2248; Taylor, Tr. 1687.

[90] Kaserman, Tr. 2248; CX 299 O-P *in camera;* RX 190D; *see* CX 92K.

2. VCM Market

The VCM market is also characterized by a substantial barrier and impediment to entry created by plant construction requirements, and an impediment to entry created by minimum scale requirements. First, substantial lead time—from four to five **[39]** years—is required to construct a new VCM plant, or to expand an existing plant, including six months to perform required preliminary engineering work; one to two years to secure needed environmental permits (the same ones noted in the PVC discussion, *supra*); six months to evaluate and secure needed VCM manufacturing technology; and one to two years for actual construction. IDF 272–277 *in camera;* Kienholz, Tr. 803–05. For example, as detailed *supra*, it took Formosa—which already had the requisite manufacturing technology in hand—about four and one-half years to construct its PVC/VCM complex. IDF 278. Similarly, Goodrich expected its proposed VCM plant in Louisiana to require approximately four years for construction. IDF 279 *in camera*. Incumbent firms confronted shorter timetables than prospective new entrants would confront now. As noted *supra*, in 1980 the Environmental Protection Agency amended its regulations to require air quality monitoring *prior* to filing permit applications. Diamond and Tenneco documents indicate that this additional requirement would add at least one year to the time needed to construct new plants, or to add capacity to existing plants where continuous air monitoring is not already in effect.[92]

Second, substantial minimum efficient scale requirements are likely to impede entry into the VCM market. If a new entrant must achieve a sales level that is a substantial percentage of **[40]** total industry output—in order to avoid suffering a significant cost disadvantage relative to other firms—its entry will increase industry supply significantly. If demand does not increase to the same degree, prices are likely to fall, because incumbent firms are more likely to lower prices than to surrender market share. Faced with the prospect of either a substantial cost disadvantage or nonrenumerative prices, a prospective entrant is not likely to enter.

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[91] Kaserman, Tr. 2249; CX 299 O-P *in camera; see* CX 92K.

[92] CX 446D; CX 574J; CRB at 40–41 n. 53; *see also* Kienholz, Tr. 803–04.

The minimum efficient scale for a VCM plant is generally considered to be 800 million to 1 billion pounds in annual production capacity.[93] When it built its billion pound VCM plant in the 1970's, Diamond "considered it essential to build a plant with a production capacity of one billion pounds of VCM per year" (CX 424B; *accord* CX 445), and estimated that plants 2/3 and 1/3 as large would respectively suffer cost disadvantages of 0.6 cents and 1.8 cents per pound. CX 445. A Georgia Pacific plant completed in 1980 similarly has a production capacity of 1 billion pounds. The plant that Formosa completed in 1982 has a capacity of 529 million pounds, but it was sized to match an existing PVC plant on the site, and Formosa was willing to **[41]** sacrifice some efficiency in order to avoid the costs associated with marketing surplus VCM.[94]

In 1981, prior to the acquisition, 6.856 billion pounds of VCM were produced in the United States. Minimum efficient plant scale (eight hundred million pounds) therefore represented about 11.7 percent of total United States VCM production in that year.[95] It is unlikely that a new entrant could secure that level of sales without provoking a substantial response from incumbent firms, thereby driving prices to lower levels. Indeed, one industry document indicated that VCM "capacity additions [are] disruptive to entire industry because efficient plant size is 1 billion pounds (10% of total U.S. industry size)." RX 90Z62 *in camera; accord,* L. Wheeler, Tr. 991. One witness—a Goodrich employee—testified that a new entrant with a new plant would need to "cut prices very substantially and over a long period of time."[96] **[42]**

The foregoing analysis establishes that environmental restrictions adopted in 1980 represent a significant barrier to entry into the VCM market, and that the four to five years currently required to construct a new plant or expand an existing plant constitute a substantial impediment to entry. It also establishes that minimum efficient scale—in conjunction with sunk cost effects—represents a substantial impediment to entry into the VCM market. Actual entry experience supports the conclusion that entry into the VCM market would be difficult.[97] [43] It took Formosa four and one-half years to complete its VCM plant, and Goodrich similarly expected its proposed VCM plant to require four years of construction. *See* page 39, *supra*. Imports are not likely to constrain domestic producer pricing discretion. They accounted for only 1.6 percent of the total VCM production of domestic firms in 1981, and only 1.8 percent in 1983. CX 663E *in camera*.

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[93] IDF 268 *in camera;* Kaserman, Tr. 2472–73; L. Wheeler, Tr. 928; DiLiddo, Tr. 3290; Taylor, Tr. 2563; *but see* Disch, Tr. 858–859 (350 million to 500 million pounds). In 1981, Goodrich concluded that a "world scale" plant would have a capacity of one billion pounds. CX 44A *in camera.*

[94] Goodrich believed that Formosa might later expand that facility to bring it up to "world scale." RX 153T *in camera.*

[95] *See* Table IV, *infra.* By comparison, minimum efficient scale for PVC plants is considerably lower, representing less than 6 percent of PVC production. *See* note 85, *supra.*

[96] DiLiddo, Tr. 3255–56. Demand growth is not likely to make entry on this scale more feasible. Industry members expect demand for VCM to grow at an annual rate of no more than 3 to 4 percent, approximating the rate of growth of the gross national product. IDF 315–16 *in camera;* Kienholz, Tr. 792. Moreover, incumbent firms already possess some excess capacity that could be devoted to accommodating demand growth.
The entry-deterring effects of the minimum efficient scale requirements are accentuated by the fact that VCM plants are highly specialized, with no application other than VCM production. IDF 270. Thus, an investment in an unsuccessful entry effort at minimum efficient scale will be completely lost, or "sunk." *See* IDF 270, 271, 280, 281. Both the Commission and the Department of Justice have recognized that entry efforts requiring the investment of substantial sunk costs are less likely to occur. *B.A.T. Industries, Ltd.*, 104 FTC 852, 935 (1984); *DOJ Guidelines* at ¶3.3 n.21.

B. Concentration Levels

As the number of firms in an industry declines, and industry concentration increases, *ceteris paribus*, it becomes easier for those firms to coordinate their pricing, and the likelihood of anticompetitive effects from an acquisition consequently increases as well.[98] Conversely, as the *DOJ Guidelines* indicate:

> Other things being equal, [market] concentration affects the likelihood that one firm, or a small group of firms, could successfully exercise market power . . . . As the number of firms necessary to control a given percentage of total supply increases, the difficulties and costs of reaching and [44] enforcing consensus with respect to the control of that supply also increase.[99]

Consistent with this view, in *United States v. Philadelphia National Bank* the Supreme Court indicated that a crucial initial question in merger cases is whether the merger or acquisition at issue

> produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, [such that]

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[97] Kaserman, Tr. 2480–85. Respondents argue that some currently mothballed capacity could be brought back into production in response to supracompetitive prices. For example, Shell mothballed its Norco, Louisiana VCM plant in 1982 because of the decline in demand during the 1981–1982 period. RX 428A *in camera;* RX 822A; L. Wheeler, Tr. 1040–42 *in camera.* Corrosion is a problem with respect to such plants, but if properly maintained they can be brought back into production within six months to a year. Rawson, Oral Argument at 49. However, if a plant is simply mothballed, it will become very expensive to restart within two years. Moreover, even if it is constantly inspected, and deteriorating components are immediately repaired, at substantial expense, corrosion will render it inoperable within four to six years. Kienholz, Tr. 783–84.
In any event, restarting mothballed capacity will usually constrain the pricing discretion of incumbent firms only if undertaken by a fringe firm that is not likely to be a party to a collusive arrangement. *Weyerhaeuser Co.*, 106 FTC at 287–88 and n. 69. As the sixth largest VCM producer, controlling almost 9 percent of VCM practical production capacity, (*see* Table V), Shell cannot be characterized as a fringe firm.

[98] *HCA v. FTC*, 807 F.2d at 1387; *accord HCA*, 106 FTC at 488–489; Scherer, *supra* note 61 at 199–200; *see also* Posner, *supra* note 58 at 52–56; Stigler, *A Theory of Oligopoly*, 72 J. Pol. Econ. 44 (1964).

[99] *DOJ Guidelines* at ¶3.1. Several factors support this conclusion. For example, inevitable differences in cost functions—and hence in price preferences—may become more pronounced as the number of firms increases. In this situation, each firm will prefer the level of output and prices that maximizes its own profits, and the difficulty of reaching and sustaining a consensus strategy will increase. *See generally* Scherer, *supra* note 61, at 156–60; Hay, *supra* note 58, at 447; G. Stigler, *The Theory of Price* 233–34 (3d ed. 1966).

> it is . . . inherently likely to lessen competition substantially . . . .[100]

The Court determined that the acquisition at issue was presumptively illegal because it would have created a bank that controlled 36 percent of the relevant market; increased two-firm concentration ("C_2") from 44 percent to 59 percent; and increased four-firm concentration ("C_4") to 78 percent. The Court observed that the presumption of illegality could be rebutted by **[45]** "evidence clearly showing that the merger is not likely to have such anticompetitive effects."[101] Subsequently, in *United States v. General Dynamics Corp.*, the Court determined that premerger four-firm concentration ratios of 43 percent and 54.5 percent in two separate relevant markets, coupled with 4.8 percentage point and 8.1 percentage point increases in the acquiring firm's shares in those markets, were sufficient to establish a *prima facie* violation.[102]

The Commission has in the past taken the position that "four-firm market shares ["C_4"] in the range of 50 percent are sufficient to raise concern over the loss of potential competition," and therefore create a rebuttable presumption that the acquisition at issue is likely to have anticompetitive effects.[103] However, the Commission has also determined that the Herfindahl-Hirschman Index ("HHI") provides a better measure of the structural character of a relevant market than concentration **[46]** ratios.[104] Its principal advantage is that it reflects not only the combined share of the largest firms, but also their shares relative to one another and to all other firms in the industry,[105] and thus provides "a useful tool in interpreting market structure evidence".[106] The Justice Department has taken the same position, and has noted that—according to an empirical study it conducted—HHIs of 1000 and 1800 correspond roughly to four-firm concentration ratios of 50 percent and 70 percent respectively.[107] A number of federal courts have also [47] recently determined that the HHI provides a useful measure of concentration levels.[108]

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[100] *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963); *accord, e.g., Weyerhaeuser Co.*, 106 FTC at 278.

[101] *United States v. Philadelphia National Bank*, 374 U.S. at 331, 363–66.

[102] *United States v. General Dynamics Corp.*, 415 U.S. 486, 494–96 (1974); *accord, e.g., FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1163–64 (9th Cir. 1984) (*per curiam*); *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 378, 383 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982); *Grumman Corp. v. LTV Corp.*, 665 F.2d 10, 12–15 (2d Cir. 1981); *RSR Corp. v. FTC*, 602 F.2d 1317, 1324–25 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *FTC v. Bass Bros. Enters., Inc.* 1984–1 Trade Cas. (CCH) ¶66,041, at 68,609–11 (N.D. Ohio 1984).

[103] *Grand Union Co.*, 102 FTC at 1054, *quoting Tenneco, Inc.*, 98 FTC 464, 585–86 (1981), *rev'd on other grounds*, 689 F.2d 346, 352 (2d Cir. 1982).

[104] *Grand Union Co.*, 102 FTC, at 1053–54. The Commission has thereby rejected its earlier contrary holding in *Litton Industries*, 82 FTC 793, 904–07, 1010–11 and nn. 33–35 (1973). The HHI is calculated by summing the squares of the individual market shares of all the firms in the market. *HCA*, 106 FTC at 488.

[105] *HCA*, 106 FTC at 488; *Grand Union Co.*, 102 FTC at 1053–54.

[106] *HCA*, 106 FTC at 488; *see also* Stigler, *supra* note 98 at 55. It also provides a basis for estimating the degree to which a small number of firms could assess supracompetitive prices without expressly cooperating with one another. Cowling & Waterson, *Price-Cost Margins and Market Structure*, 43 Economics 267 (1970); Ordover, Sykes & Willig, *Herfindahl Concentration, Rivalry, and Mergers*, 95 Harv. L. Rev. 1857, 1865 (1982).

[107] *DOJ Guidelines* at ¶3.1. However, the presence of a single very large firm will substantially increase the HHI for a given industry, *ceteris paribus*. *See, e.g.*, American Bar Association, *Antitrust Law Developments* 161 n. 115 (2d ed. 1984).

Finding a *prima facie* violation of Section 7 creates a rebuttable presumption of anticompetitive effects and shifts the burden of going forward with evidence to the respondent.[109] The Commission has noted, however, that

> the analytical soundness of this evidentiary presumption is obviously weaker in cases in which C_4 falls in the 50 percent range (or HHI falls below 1000, for example) than in cases in which C_3 or C_4 exceeds 90 percent (or HHI exceeds, for example, 2500) . . . [T]he Commission will require less evidence to overcome this presumption when only moderate concentration—C_4 levels between 50–70 percent and HHI between 1000 and 1800—is found . . .[110] [48]

More recently, the Commission has reaffirmed that although market share evidence is "an important starting point in merger analysis, it alone is not conclusive in determining the legality of a merger under Section 7."[111]

Weyerhaeuser and *HCA* represent the Commission's most recent applications of Section 7. In *Weyerhaeuser*, as a result of the challenged acquisition, the respondent had become the largest firm in the relevant market, with a 20.64 percent share that was seven percentage points higher than the share of the second-largest firm. Moreover, the acquisition had increased the market HHI for actual production by 211 points, from 955 to 1166, and had increased four-firm concentration from 48.4 percent to 57.8 percent. The Commission determined that these data were sufficient to "suggest a *prima facie* violation."[112] However, the Commission observed that the acquisition fell

> within the lower end of the midrange of the Department of Justice Merger Guidelines, and calls for especially careful review of a [49] number of industry characteristics in addition to concentration in order meaningfully to assess the acquisition's effect on

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[108] *Tenneco, Inc. v. Federal Trade Commission*, 689 F.2d 346, 359 (2d Cir. 1982) (Mansfield, J., dissenting); *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 600 F.Supp. 1326, 1329–30 n.3 (E.D. Mich.), *aff'd*, 753 F.2d 1354 (6th Cir.), *cert. dismissed*, 105 S.Ct. 1155 (1985); *United States v. G. Heileman Brewing Co.*, 563 F. Supp. 643, 644 n.3 (D. Del. 1983); *Vial v. First Commerce Corp.*, 1983 Trade Cas. (CCH) 65,692 (E.D. La. 1983); *Marathon Oil Co. v. Mobil Corp.*, 530 F. Supp. 315, 323 n.15 (N.D. Ohio), *aff'd*, 669 F.2d 378 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982) (not used, however). *But see United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 748 n. 38 (D. Md. 1976).

[109] *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 120 (1975); *Kaiser Aluminum & Chemical Corp. v. FTC*, 632 F.2d 1324, 1340 and n. 12 (7th Cir. 1981); *Weyerhaeuser Co.*, 106 FTC at 280 n. 50.

[110] *Grand Union Co.*, 102 FTC at 1055; *see FTC Statement*, ¶4516 at 6901–4. The *DOJ Guidelines* similarly characterize markets with HHI levels between 1000 and 1800 as moderately concentrated, and indicate that the Department of Justice will ordinarily challenge mergers in such markets that increase HHI levels by more than 100 points. *DOJ Guidelines* at ¶3.11. However, the presumption of anticompetitive effects arising from an acquisition that produces an HHI within the 1000–1800 range can be rebutted by evidence concerning any of a variety of other structural factors. *DOJ Guidelines* at ¶3.11(c).

[111] *AMI*, 104 FTC at 200; *accord Weyerhaeuser Co.*, 106 FTC at 278; *see also HCA*, 106 FTC at 474.

[112] *Weyerhaeuser*, 106 FTC at 280.

> competition.[113]

Its analysis of these other factors led the Commission to conclude that the acquisition did not violate section 7 of the Clayton Act.[114]

In *HCA*, by contrast, the Commission considered a market with an HHI of 1900 before the acquisitions at issue that increased to over 2400 after the acquisitions; as a result, four-firm concentration increased to 92 percent. Moreover, HCA's market share increased from 14 percent to 26 percent. The Commission found these figures supported "an inference of harm to competition," *ceteris paribus*, and characterized the increase in concentration "in an already concentrated market to be of serious competitive concern."[115]

1. PVC Market

In 1981, prior to the acquisition, approximately 5.242 billion pounds of bulk and suspension PVC were produced in the United States.[116] In 1983, after the acquisition had been completed, approximately 5.635 billion pounds were produced **[50]** domestically.[117] The record includes three separate measures of concentration levels in the PVC market: nameplate (or "design") capacity, practical production capacity, and actual production levels.[118] Prior to the acquisition, Goodrich ranked first in all three measures, while Diamond ranked sixth in nameplate capacity, fourth in practical production capacity, and fifth in actual production. IDF 34–35. The following tables depict the market shares and ranks of the eighteen firms in the United States bulk and suspension PVC market—for each of the three concentration measures—prior to the acquisition, and the same data for the fourteen firms still in the industry as of January 1984. **[51]**

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[113] *Id.*

[114] *Id.*

[115] *HCA*, 106 FTC at 488.

[116] *See* Table I, *infra*.

[117] *See* Table II, *infra*.

[118] A plant's nameplate capacity is the level of capacity that it is designed to achieve, while its practical production capacity is its effective production capacity. CPF 5.22 *in camera*. Practical production capacity thus provides a better measure of actual production constraints. Actual production levels may occasionally exceed capacity estimates if, for example, a firm chooses to reduce inventory levels or produce at a point where marginal cost is very high.

The Justice Department has taken the position that if the relevant product is branded or relatively differentiated, dollar sales provide a better measure of concentration levels. By contrast, if the relevant product is relatively homogeneous, physical capacity may provide a better measure. *DOJ Guidelines* at ¶2.4. In this case, VCM is homogeneous, while PVC is more heterogeneous. As a result, two capacity measures and an actual production (in pounds rather than dollars) measure of concentration have been used.

TABLE I

Bulk and Suspension
PVC Market Shares
Before the Acquisition
(Percentages) (United States)[119]

Firm	Nameplate Capacity (January 1982)	Practical Production Capacity (January 1982)	Actual Production (1981)
Goodrich	18.51 (1st)	17.79 (1st)	16.1 (1st)
Tenneco Polymers	12.35 (2nd)	11.72 (2nd)	12.9 (2nd)
Georgia Pacific	9.94 (3rd)	8.96 (5th)	7.8 (6th)
Shintech	9.37 (4th)	10.75 (3rd)	10.5 (3rd)
Occidental Chemical	8.60 (5th)	8.30 (7th)	7.0 (7th)
Diamond Shamrock			
Deer Park Plant #5	3.98	4.28	—
Deer Park Plants # 1–4X	3.08	3.21	—
Delaware City Plant	1.28	1.49	—
Total	8.33 (6th)	8.99 (4th)	8.3 (5th)
Conoco	8.31 (7th)	8.73 (6th)	8.6 (4th)
Borden	6.25 (8th)	6.27 (8th)	6.8 (8th)
Air Products and Chemicals	5.11 (9th)	4.63 (9th)	5.7 (9th)
CertainTeed	2.66 (10th)	3.28 (10th)	4.3 (10th)
Formosa Plastics	2.56 (11th)	2.93 (11th)	1.9 (14th)
Stauffer Chemical	1.99 (12th)	1.79 (12th)	3.0 (11th)

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[119] CX 662D-G *in camera*; CX 664-O-V *in camera*; IDF 34-38 *in camera*.

GenCorp.	1.90 (13th)	1.78 (14th)	2.6 (12th)
Ethyl	1.70 (14th)	1.79 (12th)	2.0 (13th)
Great American Chemical Corp.	0.99 (15th)	0.90 (15th)	0.3 (17th)
Keysor-Century Corp.	0.71 (16th)	0.75 (16th)	0.3 (17th)
Pantasote	0.71 (16th)	0.67 (17th)	1.4 (15th)
Talleyrand Chemicals	—	—	0.6 (16th)
Total	7.043 billion pounds	6.700 billion pounds	5.242 billion pounds [53]

TABLE II

Bulk and Suspension
PVC Market Shares
After the Acquisition
(Percentages) (United States)[120]

Firm	Nameplate Capacity (January 1984)	Practical Production Capacity (January 1984)	Actual Production (1983)
Goodrich	20.6 (1st)	19.4 (1st)	18.4 (1st)
Tenneco Polymers	12.0 (2nd)	11.4 (2nd)	11.8 (3rd)
Georgia Pacific	11.0 (3rd)	10.3 (6th)	8.4 (6th)
Formosa Plastics	10.5 (4th)	11.0 (3rd)	10.2 (5th)
Borden	10.2 (5th)	10.1 (7th)	7.7 (7th)
Conoco	9.9 (6th)	10.4 (4th)	11.0 (4th)
Shintech	9.1 (7th)	10.4 (4th)	12.7 (2nd)
Occidental Chemical	6.2 (8th)	6.1 (8th)	5.6 (8th)
Air Products			

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[120] CX 664A-V *in camera;* IDF 34–38 *in camera.*

and Chemicals	5.0 (9th)	4.8 (9th)	3.6 (10th)
CertainTeed	2.6 (10th)	3.2 (10th)	4.0 (9th)
GenCorp.	1.7 (11th)	1.6 (11th)	1.7 (12th)
Keysor-Century Corp.	0.7 (12th)	0.7 (12th)	0.7 (13th)
Pantasote	0.7 (12th)	0.7 (12th)	0.1 (14th)
Ethyl	0.0	0.0	2.1 (11th)
Total	7.251 billion pounds	6.901 billion pounds	5.635 billion pounds **[54]**

The acquisition generated increases in all three concentration measures. First, it increased the HHI for nameplate capacity by approximately 113 points, to 1098 after the acquisition. IDF 49. After Diamond closed its remaining Deer Park plants, the HHI for nameplate capacity increased by another 53 points to 1151.[121] By 1985, the HHI for nameplate capacity had increased by an additional 52 points to 1203.[122]

Second, the acquisition increased the HHI for practical production capacity by 112 points, from 967 to 1079. IDF 49. After Diamond closed its Deer Park plants, the HHI increased to 1130.[123] After Diamond closed or sold its remaining plants, the HHI increased by an additional 132 points to 1211.[124] Third and finally, the acquisition—coupled with Diamond's closure of its remaining PVC plants—increased the HHI for actual production by 221 points, from 910 to 1131. The acquisition alone probably **[55]** increased the HHI for actual production by approximately 110 points, to approximately 1020.[125]

If the later closing of Diamond's other Deer Park plants is not attributed to the acquisition, it increased Goodrich's share of nameplate PVC capacity from 18.5 percent to 22.5 percent, and its share of practical production capacity from 17.8 percent to 22.1 percent. IDF

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[121] CPF 5.27 *in camera*. This calculation is based upon treating the Delaware City facility as an independent entity.

[122] IDF 54. The use of post-acquisition structural evidence as a basis for evaluating the likelihood of anticompetitive effects from a merger or acquisition is well-established, as respondents recognize. *See* Rawson, Oral Argument at 46. The use of post-acquisition performance evidence is discussed in Part V, *infra*.

[123] CPF 5.28 *in camera*. This calculation is similarly based upon treating the Delaware City facility as a separate entity.

[124] CPF 5.28 *in camera*.

[125] IDF 53 *in camera*, *citing* CX 661Z–16 *in camera*. The record does not provide an explicit basis for assessing the effect of the acquisition of Deer Park plant number 5 alone upon the HHI for actual production levels because it does not indicate the share of actual production for which plant number 5 accounted. Kaserman, Tr. 2271. However, as Table I indicates, Deer Park Plant number 5 accounted for approximately one-half of Diamond's nameplate and practical PVC production capacities. The HHI increase in actual production actually attributable to the Goodrich acquisition is therefore probably only half of the 221 figure—assuming that plant number 5 also accounted for one-half of Diamond's actual production—or approximately 110.

52 *in camera; see* Table I, *supra*. Under the more traditional rubric of earlier cases, the acquisition increased four-firm concentration from 50.2 percent to 54.2 percent in nameplate capacity; from 49.3 percent to 53.6 percent in practical production capacity; and from 48.1 percent to over 50 percent (estimated) in actual production. *See* Table I, *supra*. The following table illustrates contemporaneous industrywide changes in both HHI levels and four-firm concentration levels:[126] **[56]**

TABLE III

Changes In Bulk and Suspension PVC HHI and Four-Firm Concentration

1980–1985

Concentration Measure	1980	1981	1982	1983	1984	1985
Nameplate Capacity[127]	897 (49.2)	928 (48.3)	985 (50.2)	1088* (53.3)	1156 (54.1)	1203 (56.1)
Practical Production Capacity[128]	871 (47.2)	940 (48.2)	967 (49.2)	1058* (52.9)	1126 (52.2)	—
Actual Production[129]	851 (45.6)	910 (48.1)	1131* (58.1)	1065 (53.8)	—	—

[57]

As the foregoing data suggest, the PVC market was not particularly concentrated prior to the acquisition, whether judged from the perspective of capacity or that of actual production levels. Under the *DOJ Guidelines*, the market after the acquisition would be classified as "moderately concentrated," but only by the barest of margins. Moreover, the 113 point, 112 point, and estimated 110 point changes in nameplate capacity, practical production capacity, and actual production barely exceed the 100 point threshold specified in the *DOJ Guide-*

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[126] The concentration data in Table III differ to some degree from the data cited in the text because of other events in the industry. Because the acquisition occurred in January 1982, the 1983 capacity data and the 1982 production data, denoted by asterisks, are the first to reflect the effects of the acquisition.

[127] CX 664F-G *in camera*. The 1985 HHI for nameplate capacity is based on January 1985 capacity estimates, which were derived in turn by adjusting January 1984 capacity to reflect Shintech's expansion of its suspension PVC plant to 1 billion pounds of capacity during 1984; GenCorp's discontinuance of its PVC business in September 1984; and Pantasote's discontinuance of its PVC business in the fourth quarter of 1984. CPF 5.69 *in camera*.

[128] CX 664M-N *in camera*.

[129] CX 664V *in camera*.

lines.[130] The HHI figures also create only a weak presumption of competitive injury under previous court and Commission cases, particularly if—as the respondents maintain—the closure of the other Deer Park plants and the Delaware City plant should not be attributed to the acquisition. In *Weyerhaeuser*, for example, the Commission considered an acquisition that had increased the relevant HHI for actual production by about 100 points *more* than this acquisition to a level about 100 points *higher* than the post-acquisition HHI actually attributable to the acquisition in the PVC market. The [**58**] Commission concluded that these effects were barely sufficient to create a weak presumption of anticompetitive effects.[131] *A fortiori*, the concentration data for the PVC market create an even weaker presumption of anticompetitive effects. Even if the closure of the other Deer Park plants *is* attributed to the acquisition, the changes in HHI levels are barely comparable to those that occurred in *Weyerhaeuser*. As a result, the evidence from other structural factors needed to rebut that presumption need not be as strong as it was in *Weyerhaeuser*.

2. VCM Market

The record also includes market share data for nameplate capacity, practical production capacity, and actual production levels for VCM. Before the acquisition, Diamond ranked third along all of these dimensions, while Goodrich ranked third in nameplate capacity (tied with Diamond and Georgia Pacific), fifth in practical production capacity, and fourth in actual production. IDF 250 *in camera*, 251 *in camera*. The following tables depict the market shares of the twelve firms in the United States VCM market, and their ranks, for each of the three concentration measures before the acquisition, and for the nine firms still in the industry as of January, 1984: [**59**]

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[130] In her concurring and dissenting opinion, Commissioner Azcuenaga states that the acquisition increased the actual production HHI by 221 points, to 1131, thereby placing the acquisition in the "moderately concentrated" range under the *DOJ Guidelines*. Opinion of Azcuenaga, Commissioner (*hereinafter Azcuenaga Opinion*), at 1. However, this assumes that the closure of Deer Park Plants numbers 1-4X, and the Delaware City plant, should be attributed to the acquisition, and the respondents vigorously dispute that assumption. The acquisition itself probably actually increased the HHI for actual production by only 110 points. *See* page 55 and note 125, *supra*.

[131] *Weyerhaeuser Co.*, 106 FTC at 280.

TABLE IV

VCM Market Shares
Before the Acquisition
(Percentages) (United States)[132]

Firm	**Nameplate Capacity (January 1982)**	**Practical Production Capacity (January 1982)**	**Actual Production (1981)**
Dow Chem.	22.52 (1st)	21.92 (1st)	22.85 (1st)[133]
Shell Oil	16.39 (2nd)	15.61 (2nd)	17.43 (2nd)
Diamond Shamrock	10.64 (3rd)	12.06 (3rd)	13.44 (3rd)
Goodrich	10.64 (3rd)	10.48 (5th)	11.30 (4th)
Ga. Pacific	10.64 (3rd)	11.27 (4th)	6.91 (6th)
PPG Industries	9.59 (6th)	9.41 (6th)	7.57 (5th)
Borden	6.48 (7th)	5.32 (8th)	4.82 (8th)
Conoco	6.39 (8th)	7.33 (7th)	6.79 (7th)
Ethyl	3.51 (9th)	3.38 (9th)	2.90 (9th)
Formosa Plas.	3.19 (10th)	3.22 (10th)	2.76 (10th)
Uniroyal	—	—	1.75 (11th)
Stauffer Chem.	—	—	1.33 (12th)
Imports (Excl. Dow)	—	—	0.14
Total	9.3965 billion pounds	8.873 billion pounds	6.856 billion pounds **[60]**

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[132] CX 662A–C *in camera*; IDF 250–261 *in camera*.

[133] This share includes imports from Dow Canada accounting for 1.5 percent of the market.

TABLE V

VCM Market Shares
After the Acquisition
(Percentages) (United States)[134]

Firm	**Nameplate Capacity (January 1984)**	**Practical Production Capacity (January 1984)**	**Actual Production (1983)**
Dow Chemical	23.34 (1st)	22.55 (2nd)	28.25 (1st)[135]
Goodrich	22.61 (2nd)	23.73 (1st)	22.26 (2nd)
Georgia Pacific	11.31 (3rd)	11.87 (3rd)	7.89 (6th)
PPG Industries	10.20 (4th)	9.91 (4th)	9.01 (5th)
Shell Oil	9.50 (5th)	8.96 (6th)	12.85 (3rd)
Formosa Plastics	9.37 (6th)	9.67 (5th)	9.02 (4th)
Borden	6.89 (7th)	5.60 (8th)	2.65 (8th)
Conoco	6.78 (8th)	7.71 (7th)	6.99 (7th)
Ethyl	0.0	0.0	1.07 (9th)
Total	8.844 billion pounds	8.427 billion pounds	7.033 billion pounds **[61]**

The acquisition increased the HHI for nameplate VCM capacity by 226 points, from 1303 to 1529. IDF 262. By January 1985 the HHI had increased to 1632. IDF 266. The acquisition increased the HHI for practical production capacity by 253 points, from 1299 to 1552. IDF 262. By January 1985 the HHI had increased to 1650. IDF 266. The acquisition increased the HHI for actual production by 304 points, from 1359 to 1663. IDF 262. The following table illustrates contemporaneous industrywide changes in both HHI levels and four-firm concentration levels:[136] **[62]**

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[134] CX 663A–F *in camera*. The decline in Shell's share occurred because it closed a plant (*see* note 97, *supra*), while the increase in Formosa's share occurred because it opened a plant after approximately five years of construction (*see* pages 34–35, *supra*).

[135] This share includes 128,300 pounds in imports from Dow Canada.

[136] The concentration data in Table VI differ to some degree from the data cited in the text because of other events in the industry. The acquisition occurred in January 1982. The 1983 capacity data and the 1982 production data, denoted by asterisks, are therefore the first to reflect the effects of the acquisition.

TABLE VI

Changes in VCM
HHI and Four-Firm Concentration
1981–1984

Concentration Measure	1981	1982	1983	1984	1985
Nameplate Capacity[137]	1318 (61.66)	1313 (60.19)	1433* (66.89)	1559 (67.46)	1632 (_)
Practical Production Capacity[138]	1293 (61.92)	1299 (60.86)	1468* (68.49)	1575 (68.06)	
Actual Production[139]	1330 (65.02)	1761* (76.14)	1741 (72.39)	—	**[63]**

The foregoing data indicate that the VCM market was substantially more concentrated prior to the acquisition than the PVC market, and that the acquisition produced a substantially greater increase in concentration in the VCM market. Under the *DOJ Guidelines*, the VCM market falls within the upper half of the moderately concentrated range after the acquisition for all three concentration measures. Moreover, the acquisition increased HHI levels along all three measures by 226 to 304 points, well above the 100 point threshold specified by the *DOJ Guidelines*. Under the more traditional rubric of earlier cases, the acquisition increased the four-firm concentration ratio from 60.2 percent to 70.8 percent in nameplate capacity; from 60.9 percent to 71.3 percent in practical production capacity; and from 65 percent to 72.6 percent in actual production. Furthermore, Goodrich increased its share from 10.6 percent to 21.3 percent in nameplate capacity; from 10.5 percent to 22.5 percent in practical production capacity; and from 11.3 percent to 24.7 percent in actual production. *See* Table IV, *supra*. These data are well above those that created a presumption of illegality in *United States v. General Dynamics* and *Weyerhaeuser*. *See* pages 44–48, *supra*. In short, the concentration data create a relatively strong presumption of anticompetitive effects in the VCM market, and relatively strong evidence from other factors is needed to rebut that presumption. **[64]**

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[137] CX 663A-B *in camera*.

[138] CX 663C-D *in camera*.

[139] CX 663E-F *in camera*.

C. *Other Structural Factors*

1. Product Homogeneity

The extent to which products in a given industry are homogeneous helps to determine the likelihood of anticompetitive effects from an acquisition. As the *DOJ Guidelines* indicate:

> In a market with a homogeneous and undifferentiated product, a cartel need establish only a single price—a circumstance that facilitates reaching consensus and detecting deviation. As the products which constitute the relevant product market become more numerous, heterogeneous, or differentiated, however, the problems facing a cartel become more complex. Instead of a single price, it may be necessary to establish and enforce a complex schedule of prices corresponding to gradations in actual or perceived quality attributes among the competing products.[140]

Two dimensions of product heterogeneity are particularly relevant.[141] First, differences in product quality may make price differentials necessary to produce a stable market equilibrium, and achieving a consensus on such differentials is **[65]** likely to be difficult.[142] Moreover, maintaining a consensus becomes more difficult when it must cover full lines of products of varying qualities, because a firm can disguise its efforts to cheat more easily.[143] Second, if transportation costs represent a substantial proportion of total product value, and if firms are located substantial distances from one another, coordination efforts must minimize or eliminate the competitive impact of these differences.[144]

a. *PVC Market*

The record provides mixed evidence concerning PVC heterogeneity. Judge Howder characterized the bulk and suspension PVC market as a "commodity" market, where purchasers generally select the lowest priced resin suitable for a particular end use. IDF 90. However, two factors—the presence of a variety of different grades of PVC resin (with **[66]** perceived differences within particular grades), and the complications arising from differing transportation costs—establish that PVC resin is in fact considerably more heterogeneous. First, there are three broad categories of PVC resin—pipe, general purpose, and specialty. Each category includes a number of PVC resin grades that are distinguished by differences in particle size, molecular weight, and purity.[145] Some PVC resin purchasers perceive differences in a given grade from one producer to another, or even from one plant of a given firm to another. As a result, they insist upon "qualifying" a particular PVC resin grade before purchasing it from a particular PVC producer.[146] The results of the testing, or subsequent use of the resin, on occasion lead purchasers to conclude that the resin grades involved cannot be used.[147] The need to qualify not only *grades* of resin, but also the grade of resin produced by a *particular* firm, makes PVC buyers reluctant to switch suppliers without price or quality concessions.

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[140] *DOJ Guidelines* at ¶3.411; *accord, e.g., HCA v. FTC*, 807 F.2d at 1390; *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969); *United States v. FMC Corp.*, 306 F.Supp. 1106, 1111–12, 1143 (E.D. Pa. 1969); *FTC Statement*, ¶4516 at 6901–4.

[141] *See generally* Scherer, *supra* note 61, at 200–03; Posner, *supra* note 58, at 51.

[142] Scherer, *supra* note 61, at 201. If a significant level of product differentiation exists, each firm will probably confront significantly different demand and marginal revenue curves. Therefore, even if its marginal cost function is identical to those of the other firms in the industry, each firm will prefer to operate at a different point on that function, and hence will prefer a different price than its rivals. *Id.* at 158.

[143] *See* Hay, *supra* note 58, at 448.

[144] Scherer, *supra* note 61, at 201; Haddock, *Basing-Point Pricing: Competitive v. Collusive Theories*, 72 Am. Econ. Rev. 289 (1982); *see DOJ Guidelines* at ¶3.413. For a general discussion of product differentiation, *see* Scherer, *supra* note 61, at 375–405.

Pipe, siding and calendar grades of PVC resin, also characterized as "commodity" grades, account for about 75 percent **[67]** of bulk and suspension PVC sales.[148] Service with respect to these grades is considered to be relatively unimportant. The remaining 25 percent of bulk and suspension PVC resins are sold in several grades that differ in particle size, molecular weight, and purity as a function of purchaser end-use requirements.[149] Nevertheless, it is difficult to charge a significant price premium for any given grade of PVC. As one witness testified,

> there is a degree of customer loyalty in this business, but I would characterize it more as one that will give you an opportunity to *meet the price* in most cases rather than a willingness to pay a premium.[150]

Commissioner Azcuenaga relies upon evidence of this sort to conclude that PVC resin buyers are willing to switch suppliers of a given grade in response to small price differences. *Azcuenaga Opinion* at 8. But switching suppliers of a given grade entails significant costs. *See* page 88, *infra*. Moreover, the fact that a given PVC grade may be relatively homogeneous does not alter **[68]** the fact that different PVC grades differ significantly from one another.[151]

Second, transportation cost differences are likely to complicate the determination and enforcement of consensus prices. Although several manufacturers operate PVC resin plants along the Gulf Coast, in

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[145] Disch, Tr. 632, 634–35; Becker, Tr. 1255–59; Klass, Tr. 4333; RX 2Z11–15.

[146] Becker, Tr. 1330–31, 1332–34; RX 875B *in camera;* RX 222D-E *in camera;* RX 589T; RX 1049A *in camera;* RX 258A *in camera;* RX 537B; RX 541A; *see* H. Wheeler, Tr. 1747–48.

[147] RX 221I *in camera;* RX 260B *in camera;* RX 545A; RX 1041A.

[148] Weber, Tr. 1795.

[149] IDF 85. For example, medical grade resins are considered to be specialty grades, and command a small price premium over commodity grades. IDF 88. Many customers find technical services offered in conjunction with the sale of specialty grades to be useful. IDF 89.

[150] Schaefer, Tr. 1203 (emphasis added); *accord* Becker, Tr. 1330–1332.

[151] The crucial point about product heterogeneity is that it substantially complicates the determination and enforcement of consensus prices. Instead of establishing a single price for a single homogeneous product, firms must establish and maintain a whole series of prices for a whole series of product grades.

Texas, Louisiana and Mississippi, others operate PVC resin plants in widely scattered locations. For example, as of October 1983 Air Products' only plant was located in Pensacola, Florida, while Borden's largest plant was in Illinois, and it operated another substantial plant in Massachusetts. Similarly, as of October 1983 Conoco, Formosa, Georgia Pacific, Occidental, and Tenneco respectively operated substantial plants in Oklahoma; Delaware; Delaware; New Jersey and Pennsylvania; and New Jersey. Finally, as noted above, Goodrich itself operates substantial plants in Ohio, Illinois, California, Kentucky, and **[69]** New Jersey.[152]

b. *VCM Market*

The VCM market is substantially more homogeneous than the PVC market. VCM is produced in only one grade, and there are only minor trace differences in impurity levels from one firm's product to another; there is no customized VCM production. IDF 283, 285. Diamond and Goodrich admit that VCM is an essentially fungible product.[153] Moreover, all except one VCM plant are located along the Gulf Coast, in either Texas or Louisiana. IDF 284 *in camera*. As a result, transportation costs are not a significant source of product differentiation. Furthermore, the VCM industry is technologically stable; significant process or product technological changes are unlikely to occur over the next few years. IDF 285. In addition, VCM firms secure product from one another through exchanges, tolling **[70]** agreements, and purchases, all for the purpose of resale;[154] that factor supports the conclusion that the product is homogeneous. As one witness testified:

> Most people would say you can't tell [VCM produced by different American manufacturers] apart. It is a true commodity chemical.[155]

2. Price Elasticity of Demand

The price elasticity of demand for a product measures the degree to which a change in its price will produce a change of opposite sign

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[152] RX 1204G *in camera;* RX 1168A-B *in camera.* Bulk and suspension PVC is generally sold on a delivered price basis (Diamond Admission 475 (CX 6T); Goodrich Admission 432 (CX 4Z28)), but it is not clear from the record whether the delivered price is *uniform* throughout the relevant geographic market. If delivered prices are not uniform, then detecting cheating becomes considerably more difficult.

As Commissioner Azcuenaga points out (*Azcuenaga Opinion* at 10), the relevant geographic market is national rather than regional. However, transportation cost differences need not be large enough to create regional markets in order to complicate the task of developing a single consensus price, particularly given the fact that PVC plants are scattered all over the country.

[153] Goodrich Admission 465 (CX 4Z33); Diamond Admission 505 (CX 6U); Taylor, Tr. 1565; Klass, Tr. 5363.

[154] CPF 24.09, *citing, e.g.*, CX 557Z11 *in camera;* L. Wheeler, Tr. 972–75 *in camera;* CX 88 *in camera.*

[155] Keinholz, Tr. 813. Respondents nevertheless describe VCM as "commercially heterogeneous" because of differences in sales terms from one producer to another, including price, credit terms, method of delivery (pipeline, rail tank car, or tolling arrangement), and contract length (short-term, long-term, or spot). IDF 286 *in camera,* RPF 403 *in camera.* These factors relate to industry performance, rather than structure, however, and performance factors are discussed in Part V, *infra.* In any event, as the Commission has previously indicated, "agreements as to all aspects of competition are not necessary for effective collusion to take place and to have a negative impact

(footnote cont'd)

in the quantity of the product that is demanded.[156] As the price elasticity of demand for a product declines, the [71] degree to which an increase in that product's price can be sustained without losing a significant number of sales increases, for two reasons. First, industry firms will find it easier to collude profitably, because an effort to raise prices to supracompetitive levels will not induce as many buyers to switch their purchases to alternative products.[157] Second, industry firms will have a greater incentive to collude, because the additional revenue that any given price increase produces will increase. In particular, when the price elasticity of demand is less than one—with costs held constant—an industrywide price increase will increase rather than reduce industrywide profits.[158]

The likelihood of anticompetitive effects from an acquisition thus increases as the price elasticity of demand for the product at issue declines.[159] Both PVC and VCM are intermediate products, used as inputs in manufacturing final [72] products. As a result, their respective price elasticities increase as (1) the degree to which other inputs can be substituted for them increases; (2) the proportion of total costs for which each account increases; and (3) the price elasticity of demand for PVC end products and PVC resin—the products for which they are respectively used—increases.[160]

a. *PVC Market*

Three factors establish that the price elasticity of demand for bulk and suspension PVC resin is relatively low. First, there are no practical substitutes for PVC resin in manufacturing PVC products. IDF 95. PVC resin is the primary raw material input for PVC end use products, and it "imparts essential properties to the product." Much of the fabrication equipment used for bulk and suspension PVC end use products can process only bulk or suspension PVC resins.[161]

Second, with the exception of PVC pipe, bulk and suspension PVC resins account for relatively small proportions of the cost of finished PVC products. All PVC resins must be compounded before they are processed, and at that stage, additives such as heat and light stabiliz-

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on competition." *HCA*, 106 F.T.C. at 508, *accord Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 648–650 (1980) (agreement to refuse to extend credit *per se* illegal).

[156] More formally, the price elasticity of demand can be expressed as the absolute value of the product of (1) price divided by quantity, and (2) quantity demanded differentiated with respect to price. *E.g.*, Scherer, *supra* note 61, at 157 n. 13.

[157] *HCA v. FTC*, 807 F.2d at 1388; HCA, 106 FTC at 499.

[158] *See HCA v. FTC*, 807 F.2d at 1388. A monopolist will ordinarily raise prices until the price elasticity of demand is greater than one. At that point, an increase in prices may or may not increase profits, depending upon whether costs are increasing faster or more slowly than revenues. Kaserman, Tr. 2354–55, 2363–64.

[159] *HCA v. FTC*, 807 F.2d at 1388, 1389; *Marathon Oil Corp. v. Mobil Oil Corp.*, 669 F.2d 378, 381 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982); *FTC Statement*, ¶4516 at 6901–3; *see also United States v. Container Corp. of America*, 393 U.S. at 337; *Wall Products Co. v. National Gypsum Co.*, 326 F.Supp. 295, 300 (N.D. Cal. 1971).

[160] *E.g.*, M. Friedman, *Price Theory* 158 (1976); IDF 287, *citing* Kaserman, Tr. 2369–71.

[161] H. Wheeler, Tr. 1751–52.

ers, impact modifiers, plasticizers and [73] pigments are added.[162] A variety of manufacturing processes—including extrusion, calendaring, blow molding, injection molding and compression molding—must then be used to convert PVC compounds into finished PVC products. IDF 96. The cost of PVC resin accounts for about 55 to 60 percent of the cost of PVC pipe sold to distributors, and a smaller percentage of its final cost installed.[163] However, it accounts for much lower percentages of the cost of all other finished PVC products. For example, it accounts for only about 25 percent of the cost of vinyl siding sold to distributors, and only about 5 percent of its final cost installed.[164] Similarly, it represents only about 13 to 14 cents of the cost of a finished phonograph record. IDF 186–188 *in camera;* Disch, Tr. 659. Finally, it accounts for only a small [74] percentage of the cost of most PVC end products manufactured from calendered PVC resin. IDF 193. For example, it represents 5.6 percent of the retail price of a $7.99 vinyl shower curtain, and 4.5 percent of the retail price of a $1.79 vinyl shower cap.[165] Because there are no substitutes for PVC resin in fabricating PVC end-use products, and because PVC resins generally account for only small percentages of the final costs of fabricating those products, the demand for bulk and suspension PVC resin is less price elastic than the demand for PVC end use products.[166]

Third, although the price elasticity of demand for different finished PVC products varies substantially, it is relatively low for most such products. It is lowest in the wire and cable segment, the packaging film and sheet segment, the phonograph record segment, and the medical end use segment. These segments together account for 21 to 23 percent of total domestic PVC consumption. *See* pages 18–19 and note 42, *supra.* The price elasticity of demand for PVC pipe, siding, floor tile, and window frames is higher because of competition from products manufactured from alternative materials, but is still relatively low. For example, a 1983 Goodrich analysis indicated:

> PVC pipe manufacturers appear to have plenty of room for price increases before approaching the price levels of most competing materials. (Even if the prices [75] were identical, PVC would still have the added advantage of lower installed cost.)

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[162] For example, flexible PVC compounds used to manufacture wire, cable and flexible sheeting are produced by adding plasticizers to the resins. As a result, they frequently contain only 50 to 70 percent PVC resin by weight. By contrast, rigid PVC compounds do not contain plasticizers, and therefore contain as much as 80 to 95 percent resin by weight. IDF 96; Disch, Tr. 659.

[163] Yu, Tr. 2104; Disch, Tr. 663.

[164] IDF 163 *in camera;* Belt, Tr. 2026–27, 2040–41 *in camera;* CX 756Z59. Similarly, PVC resin accounts for only 15 to 20 percent of the cost of vinyl floor tiles (Disch, Tr. 673–74; IDF 168), and for no more than 30 to 50 percent of the cost of the PVC compounds used to fabricate bottles and wire and cable insulation. Becker, Tr. 1305–07, 1318–19; IDF 178; Disch, Tr. 660–61. It accounts for 15 percent of the price of vinyl window fabricators, and only 3 percent of the price of installed vinyl windows. Belt, Tr. 2058–61 *in camera.*

[165] IDF 193; DiLiddo, Tr. 3376–79.

[166] Kaserman, Tr. 2375–78.

CX 247A *in camera*. These segments together account for 53 to 55 percent of total domestic PVC consumption. *See* pages 18–19 and note 42, *supra*. Finally, the price elasticity of demand for rigid and flexible calendered products and bottles is considerably higher because of competition from products manufactured from alternative materials. These segments together account for 21 to 27 percent of total domestic PVC consumption. In short, the price elasticity of demand for products accounting for 73 to 79 percent of total domestic PVC consumption is relatively low.

On balance, the price elasticity of demand for most PVC resins appears to be relatively low. There are no practical substitutes in manufacturing PVC products; PVC resin generally accounts for only a small percentage of the final prices of those products; and the price elasticity of demand for most PVC end products is relatively low. One witness confirmed that for the bulk and suspension PVC market overall, there was very little price sensitivity,[167] and another stated that PVC is not a price elastic market.[168] **[76]**

b. *VCM Market*

The price elasticity of demand for VCM is very low, on the basis of the three criteria discussed *supra*. IDF 287, 288. First, no other input can be substituted in producing PVC.[169] As a result, VCM's price elasticity of demand is necessarily lower than that of PVC.[170] Second, the price elasticity of demand for PVC is itself relatively low. The third criterion is less conclusive; VCM accounts for 50 to 60 percent of the cost of producing PVC.[171] When considered together, these three **[77]** criteria indicate that the price elasticity of demand for VCM is lower than that of PVC resin, and hence very low in an absolute sense. This analysis is consistent with the views of a number of Goodrich employees and trial witnesses that the demand for VCM is "absolutely inelastic."[172]

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[167] Becker, Tr. 1325–26; *accord* CX 297Z1–Z2 *in camera*.

[168] Schaefer, Tr. 1141; *accord* CX 295Z53–Z54 *in camera*. Respondents' expert testified that

> very likely were there to be a sustained anticompetitive price increase in PVC, there would be a substantial degree of substitution.

Klass, Tr. 4151. However, most of the record evidence supports our conclusion that the price elasticity of demand for PVC is relatively low.

[169] Kaserman, Tr. 2484; Diamond Admission 57 (CX 6D).

[170] Kaserman, Tr. 2484–85; Klass, Tr. 4003–4006, 4532.

[171] In response to a question at oral argument from then-Acting Chairman Calvani, counsel for Goodrich indicated that in 1984, the cost of VCM represented 55.6 to 62.3 percent of the cost of producing suspension resin; 49.6 to 61.3 percent of the cost of producing pipe grade suspension resin; and 49.6 to 61.9 percent of the cost of producing flexible grade suspension resin. Letter from Robert H. Rawson to Acting Chairman Calvani (February 6, 1986), at 2 *in camera*. The Commission hereby makes the Rawson letter—and the response filed by complaint counsel—a part of the *in camera* record in this proceeding.

The Rawson letter estimates are consistent with other record evidence. One study indicates that in January 1983, VCM accounted for 54 to 62 percent—as an average among PVC producers—of the "total cash cost" of producing PVC. RX 1213H *in camera*; *see* CX 246 *in camera*. A second 1981 study conducted by Air Products suggests that VCM accounts for 65 to 75 percent of total PVC production costs. RX 57A *in camera*.

[172] Lefebvre, CX 296Z72 *in camera*; *accord* Schaefer, CX 296Z4 *in camera*; Becker, CX 297Z6–7 *in camera*; *see also* Kienholz, Tr. 811–12; Taylor, Tr. 1706.

3. Cost Functions

The similarity of cost functions among industry firms also affects the likelihood of anticompetitive effects from an acquisition. If cost functions vary widely from one firm to another, each will prefer a different industry price level, and developing a collusive consensus price will consequently be more difficult.[173] If there are only a few firms in the industry, cost differences nevertheless may not prevent firms from accepting price or output levels somewhat different from their optimal levels.

a. *PVC Market*

PVC production costs vary significantly among producers. These cost differences occur in two of three broad cost [78] categories: (1) the cost of converting VCM into PVC; and (2) the cost of transporting PVC to purchasers.[174] First, PVC production costs differ significantly from one firm to another. It is true that the technology needed to produce PVC is widely available to all producers, and no significant patents impede production by any particular firm. IDF 195. Moreover, the clear trend in the industry has been toward larger reactors. A Goodrich employee and another witness estimated that raw materials efficiency in these larger reactors is close to 100 [79] percent.[175] Several industry witnesses testified that producer manufacturing costs using large reactors were similar,[176] and about two-thirds of installed capacity is in the form of larger reactors. IDF 198; Disch, Tr. 641.

Nevertheless, the remainder of industry capacity is in the form of smaller reactors that produce a variety of specialty resins. As a result, production costs vary significantly from one PVC resin grade to another.[177] For example, pipe resins are usually produced in highly efficient large reactors, and require little or no technical customer service. RX 34R; Klass, Tr. 4322. By contrast, specialty resins are costlier to produce, because they tend to be manufactured in less efficient smaller reactors, and require more technical customer services.[178] **[80]** Because different firms use reactors of different sizes to produce different PVC resins, their production costs differ significantly. A 1982 Goodrich cost study of eight PVC producers indicated that "total plant operating costs" for producing PVC varied among plants from 14.30 cents per pound to 21.94 cents per pound.[179] These cost differences are accentuated by the fact that different PVC producers emphasize the production of different PVC grades.[180]

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[173] *See FTC Statement*, ¶4516 at 6901–4. Profit maximization is a function of both marginal cost and marginal revenue. High-cost firms will usually prefer higher umbrella price levels and lower output levels than firms with lower costs. *See, e.g.*, Posner, *supra* note 58, at 51.

[174] The third broad category is the cost of acquiring (or producing) and transporting VCM. Respondents estimate that in 1980, integrated firms' cost of producing VCM varied by up to 3 cents per pound, when the new materials used are valued at market prices. RAB at 42–43. Of course, the allocation of joint costs in integrated firms is necessarily arbitrary, and presents a notoriously difficult accounting problem.

It seems unlikely that VCM cost differences between integrated and nonintegrated producers are either significant or persistent. As complaint counsel point out, the "opportunity cost" of VCM, rather than its actual production cost, should be attributed to vertically integrated PVC producers. The opportunity cost is the price at which an integrated firm could sell VCM if it did not use it internally. *See* Scherer, *supra* note 61, at 305; Stigler, *supra* note 61, at 105. If internal VCM costs were persistently lower than opportunity costs, nonintegrated producers would not be able to compete with integrated producers. *See, e.g.*, *Azcuenaga Opinion* at 13 n.22, *citing* Klass, Tr. 5337–38; IDF 203. One would also expect entry into the PVC market to require simultaneous entry into the VCM market. Respondents make no such claim.

With respect to VCM transportation costs, PVC producers that receive VCM via pipeline realize a cost advantage of 0.5 cents to 1.0 cent per pound. RPF 292 *in camera*, *citing* RX 57Z62 *in camera*.

[175] DiLiddo, Tr. 3395; Disch, Tr. 641–43.

[176] IDF 199; Disch, Tr. 645; Schaefer, Tr. 1149.

[177] The cost of producing general purpose PVC resin may be as much as [ ] cents per pound lower in a large reactor than in a small reactor. RX 875V-W *in camera*. Most firms operate several different sizes of reactor. For example, Tenneco operates some 3,750 gallon reactors at its Burlington, New Jersey plant, and some 34,000 gallon reactors at its Pasadena, Texas plant. Disch, Tr. 638. Reactors with a capacity of 18,000 to 50,000 gallons are classified as large reactors. Disch, Tr. 640.

Second, as noted *supra*, transportation costs differ to some degree from one PVC producer to another. In particular, significant locational differences mean that PVC producers incur different costs in shipping PVC resin throughout the United States.[181] Complaint counsel maintain that most PVC is sold on a delivered price basis, and that price differences based on location have therefore effectively been eliminated. CPF 7.14. However, although uniform delivered pricing may have this effect, it is unclear whether delivered PVC prices are in fact uniform. **[81]** Thus, transportation cost differences may further complicate any effort at price and output coordination in the PVC market.[182]

b. *VCM Market*

VCM production costs are much more similar from one VCM producer to another. There are two basic categories of manufacturing costs: (1) the cost of ethylene and chlorine feedstocks; and (2) the cost of converting them into VCM. IDF 290 *in camera*. In addition, transportation costs must be considered. Raw material costs are virtually identical. Virtually all VCM plants produce VCM from ethylene and chlorine feedstocks.[183] Ethylene and chlorine must be used in fixed proportions to produce VCM (60 percent chlorine and 40 percent ethylene), all firms use them in those proportions, both are highly homogeneous products, and VCM producers therefore pay similar prices for them.[184]

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[178] Becker, Tr. 1330-32; Arp, Tr. 3519-20; RX 34R; RX 639E. Giles Disch testified that there would be no economic advantage to Tenneco to construct a new small reactor plant today. Disch, Tr. 640. No new small reactor plant has been built in the United States since the late 1960's. Disch, Tr. 642.

[179] RX 1168A-B *in camera*; RX 245-0 *in camera*; RAB at 43, *citing* RPF 290-92; *accord* DiLiddo, Tr. 3224-26. Of course, these differences are not surprising because the plants studied produce a wide variety of PVC resins. During the 1981-1983 period, the average selling price of "general purpose PVC resin" ranged from 17 cents per pound to 35 cents per pound. RPF 291, *citing* CX 671A-C, F-H; RX 244A.

[180] RX 1170A; Klass, Tr. 4321-22.

[181] RPF 295 *in camera, citing* RX 1168A; RX 13K; RX 13Z5; McMath, Tr. 1956-57; RX 34Q; RX 264B; RX 325H; RX 945A-O; *see* page 67, *supra*.

[182] Complaint counsel also argue that locational differences "cancel out;" that is, the cost of shipping incoming VCM cancels out the cost of shipping outgoing PVC. IDF 201; ID at 61 n. 42. However, the VCM may originate in a location different and distant from the destination of the PVC into which it is converted.

[183] IDF 292 *in camera*. The one exception is a plant owned by Borden which produces VCM using a much older acetylene process. That plant accounts for only 2 percent of practical production capacity. *Id.*

[184] IDF 293-294 *in camera*; Goodrich Admissions 59-60; CX 4I; L. Wheeler, Tr. 917-18.

Second, all producers have access to similar production technologies, which permit the production of large volumes at low **[82]** cost, because there are no significant patent barriers. IDF 291. Respondents' expert testified:

> [M]ost producers, if not all, have access to effective production technology which enables them to produce large volumes at low costs.[185]

Another witness testified that in the VCM market, no firm has

> a peculiar proprietary niche or some position that allowed [one firm] to achieve returns or earnings that somebody else couldn't . . .[186]

Furthermore, because VCM manufacturers produce only one grade of VCM, there is no reason—unlike the PVC market—to retain both large and small reactors. As a result, all VCM producers operate large, highly efficient plants. Several witnesses confirmed that all VCM producers have similar manufacturing costs. One estimated that short-run avoidable costs differed by only one-half cent per pound among firms in the industry.[187] Two other witnesses agreed that there is no significant cost disparity from one firm to another.[188] A 1981 Air Products **[83]** study similarly concluded that VCM processing costs varied little from one VCM firm to another.[189]

Third, transportation costs do not differ significantly from one VCM producer to another, primarily because all except one domestic VCM plant are located along the Gulf Coast in Texas and Louisiana.[190] On balance, the record evidence establishes that VCM production costs are relatively similar across firms. Although respondents have identified some minor differences,[191] absolute congruence is not needed to heighten the likelihood of anticompetitive effects from the acquisition. **[84]**

4. Size Distribution of Purchasers

The size distribution of purchasers of the relevant product may also affect the likelihood of anticompetitive effects from an acquisition. If a small number of buyers accounts for a large percentage of total product purchases, that may constrain the pricing discretion of product manufacturers to some degree.[192] By contrast, a large number of buyers are not likely to be able to constrain manufacturer pricing discretion.

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[185] Klass, Tr. 4009.

[186] Kienholz, Tr. 884.

[187] L. Wheeler, Tr. 936–38.

[188] Kienholz, Tr. 814; Taylor, Tr. 1570.

[189] RX 57Z29, Z131 *in camera; accord* RX 877B *in camera.*

[190] RX 57Z6 *in camera.* The only exception is Goodrich's Calvert, Kentucky plant. *Id.*

[191] *See* RPF 410 *in camera, citing* RX 877D; RPF 411–412 *in camera;* RAB at 42–43. For example, respondents argue that VCM producers confront dissimilar raw materials costs as a function of whether or not they are integrated upstream into chlorine and caustic soda production. RPF 411 *in camera.* However, as discussed in note 174 *supra,* the appropriate cost at which to evaluate an internally transferred input is its market price (opportunity cost), because that is the value the integrated firm gives up by using the input internally instead of selling it on the open market. Moreover, even if upstream integration could be a source of differentiation, it would have little significance in this case because in 1983 firms accounting for nearly 80 percent of total VCM practical production capacity *were* integrated into chlorine production. Only Borden, Shell and Conoco were not so integrated. RX 246.

a. *PVC Market*

It seems unlikely that PVC purchasers could, by virtue of their size, constrain the exercise of market power by PVC producers. One 1979 Goodrich study indicated that the largest PVC buyer (Carlon) accounted for less than 7 percent of the PVC market, and that 300 PVC buyers together accounted for 80 percent of the market. The study indicated that the

> customer base is attractive because it is readily identifiable, small enough to be reached by a manageable and economic sales force, yet not so concentrated that one or two customers can put enormous pressure on the suppliers to lower price. The biggest customer in the PVC business (Carlon) accounts for less than 7 percent of the total market.

CX 53J-K; *accord,* CX 64P,S. That pattern is also present in many of the product market segments For example, Goodrich studies from the late 1970's identify 136 wire and cable purchasers (purchasing 8.4 percent of total PVC production); 166 flexible [85] resin purchasers (18.1 percent); and 263 specialty resin purchasers (2 percent). IDF 216. The pipe segment is somewhat more concentrated on the buyer side. Although 100 buyers purchase pipe resin (accounting for 40 percent of total PVC production), the four largest purchasers account for 60 percent of that total, or 24 percent of total PVC production.[193]

b. *VCM Market*

The level of concentration among VCM purchasers is considerably greater. Seven PVC producers—Air Products, CertainTeed, Keysor-Century, Occidental, Pantasote, Shintech and Tenneco—do not produce VCM, and therefore must purchase it from other firms.[194] Nevertheless, concentration levels are substantially higher among VCM producers than among VCM buyers; only three nonintegrated VCM producers accounted for approximately one-half of VCM production in 1982. It therefore seems unlikely that VCM buyers could constrain the pricing discretion of VCM sellers to any significant degree.

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[192] *HCA v. FTC,* 807 F.2d at 1391, *citing* Stigler, *supra* note 61 at 39, 43–44; *see FTC Statement,* ¶4516 at 6901–4; *DOJ Guidelines* at ¶3.42.

[193] IDF 216–217; Disch, Tr. 683; *see* RPF 336 *in camera, citing* RX 35E; RX 639D; RX 669B.

[194] IDF 78. The remaining five PVC producers—Goodrich, Formosa, Georgia Pacific, Borden and Conoco—are fully integrated upstream into VCM production. *Id.* The three remaining VCM producers are not integrated downstream into PVC production. *Id.*

5. Transaction Characteristics

The manner in which sales are typically made in an industry also affects the likelihood of anticompetitive effects from an **[86]** acquisition, for two reasons. First, if most firms make only a few sales each year, their incentives to cheat are likely to be high. Each additional sale contributes substantially to income, and the risk of effective retaliation from competitors is correspondingly reduced. On the other hand, if the typical firm makes many sales each year, the value of cheating on a given transaction is not substantial and the prospect of effective retaliation may be correspondingly greater.[195] Second, when sales are made openly, cheating can be detected quickly and easily, and retaliation by rival firms is consequently more likely. On the other hand, when sales are made through private negotiations, it is much more difficult to detect and punish secret price concessions.[196]

a. *PVC Market*

Approximately 50 to 60 percent of bulk and suspension PVC resin is sold pursuant to written contracts, normally one year in duration.[197] Although the contracts may specify an expected volume for the entire year, buyers typically advise sellers each **[87]** month of the amount they will purchase the following month.[198] Thus, in practical effect, buyers purchase product on a monthly or even daily basis.[199]

PVC sales contracts also typically do not specify the prices that are to prevail throughout the contract term. Instead, they rely upon "competitive price provisions," in which a buyer notifies the seller when it has

> a competitive offer for equal terms, equal quantities, equal time situations, which allows us as the seller to generally either meet that new criterion or decline. . . . [and] not supply that volume stipulated.[200]

In short, pursuant to these clauses, buyers are permitted to cancel purchases if they can secure lower prices elsewhere, but are required to give sellers the opportunity to meet competing offers. IDF 211 *in camera*. The competitive price provisions ensure that PVC sellers quickly discover price concessions offered by competing firms. *See* IDF 237.

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[195] *DOJ Guidelines* at ¶3.42; Scherer, *supra* note 61, at 220–22; Hay, *supra* note 58, at 450.

[196] Scherer, *supra* note 61, at 222–25; Hay, *supra* note 58, at 450–51.

[197] IDF 211 *in camera*, 219 *in camera*; DiLiddo, Tr. 3253 (Goodrich: 60 percent contract business; 20 percent "handshake type of relationship;" 20 percent "spot basis"); Weber, Tr. 1790 (Diamond: "Well over 50 percent was sold under contract."); Disch, Tr. 685.

[198] *E.g.*, Disch, Tr. 685.

[199] IDF 218; Disch, Tr. 707, 728; McMath, Tr. 1897, 1951; Schaefer, Tr. 1140, 1200; *see* RX 599A.

[200] Disch, Tr. 684; *accord* DiLiddo, Tr. 3254–55; Weber, Tr. 1789–90. On the significance of similar provisions for facilitating collusion, *see generally* Salop, *supra* note 58; Clark, *supra* note 58.

A significant proportion of the remaining 40 to 50 percent of PVC sales is made pursuant to an ongoing customer-supplier "handshake" relationship, in which orders are placed and filled [88] on a "current market conditions" basis.[201] These relationships are relatively secure because of certain peculiarities associated with any given brand of PVC resin. A particular supplier's PVC resin must be tested on a customer's fabricating equipment, and the equipment must be adjusted to the resin's formulation before that customer can use it.[202] Customers are therefore reluctant to switch suppliers, and will not do so when competing prices are identical. IDF 220. Moreover, although some firms buy PVC from more than one supplier, they fill their requirements for a given plant from one supplier, in order to ensure plantwide consistency. IDF 221. These considerations lead customers buying on a "handshake" basis to notify their sellers of competitive offers, so that suppliers regularly receive information concerning lower prices from these buyers as well. IDF 237.

These factors together suggest that the frequency and size of transactions in the PVC market increase the likelihood of anticompetitive effects from the acquisition in that market. [89]

b. *VCM Market*

Contracts for the purchase of VCM are typically quite similar to PVC purchase contracts; they are discussed in detail in Part IV.C.7, *infra*. As a result, the frequency and size of VCM purchase transactions similarly increase the likelihood of anticompetitive effects in the VCM market. Of course, a substantial proportion of VCM production is manufactured by firms that are integrated into PVC production. The significance of that fact is also discussed in detail in Part IV.C.7, *infra*.

6. Stability and Predictability of Demand and Supply Conditions

The stability and predictability of demand and supply conditions also help to determine the likelihood of anticompetitive effects from an acquisition. Greater stability and predictability make it easier to create and sustain a collusive arrangement. By contrast, shocks that suddenly alter demand or supply conditions may complicate collusion. In industries in which fixed costs are a high percentage of total costs, the presence of substantial excess capacity—as a result of a sudden decline in demand—may place strong downward pressure on prices.[203] Firms may in the short run be willing to sell at prices below their average total costs, because prices at such levels, in addition to covering all variable costs, cover at least a portion of their fixed costs. However, fixed costs are not a particularly large proportion of total costs in either the PVC or the VCM market. *See* note 171, *supra*, and pages 92 and 94, *infra*. Moreover, during periods of demand growth, such as the period beginning in 1983 and continuing today, any pressure to [90] reduce PVC or VCM prices that producers' fixed costs might have created has disappeared, because capacity utilization has returned to high levels.

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[201] IDF 219 *in camera*. The remaining proportion of PVC sales is made on the spot market.

[202] Yu, Tr. 2169; DiLiddo, Tr. 3371-72; H. Wheeler, Tr. 1747-48.

[203] *See, e.g.*, Hay, *supra* note 58 at 450; Scherer, *supra* note 61, at 209.

a. *PVC Market*

Demand for PVC grew rapidly in the 1960's and 1970's, largely because of growth associated with construction applications. In the 1960's, the industry grew at an average annual rate of 13 to 15 percent, but that rate declined to 10 to 11 percent in the early 1970's. IDF 233; IDF 234 *in camera*. The average annual growth rate then fell to 8 percent by the end of the 1970's, and since 1979 the industry has grown at an average rate of 3 to 4 percent annually. IDF 234. A number of witnesses testified that PVC resin is a "mature product," and that annual growth will approximate annual GNP growth (3 to 4 percent annually) for the foreseeable future. IDF 235; Disch, Tr. 692.

Capacity utilization levels in the PVC market vary with general economic conditions, particularly conditions in the construction industry. Respondents note that in the 1980's, construction has accounted for "well over 50%" of PVC consumption.[204] The most relevant measure of capacity is practical production capacity, because it determines the amount of capacity that can be placed in production at little additional marginal cost. Between 1970 and 1974, practical production [91] capacity ranged from 96 percent in 1970 to 94 percent in 1973, and never fell below 93 percent. In 1974, with the onset of the recession, capacity utilization fell to 89 percent, and to 64 percent in 1975, before climbing to 78 percent in 1976, 86 percent in 1977, 94 percent in 1978, and 93 percent in 1979. In 1980, when interest rates rose and construction declined, capacity utilization fell to 80 percent. It remained at 80 percent in 1981, fell with the recession to 75 percent in 1982, increased to 84 percent in 1983, and increased again to an estimated 91 percent in 1984.[205] A number of witnesses testified that capacity utilization levels would continue to increase gradually during the 1980's.[206] Several record documents indicate that an 80 percent capacity utilization level makes PVC resin prices profitable. For example, a 1983 Goodrich document indicates that "industry capacity utilization around 80% . . . **[92]** [h]istorically . . . has supported price increases . . ."[207]

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[204] RPF 103 *in camera, citing* RX 1173A. Construction applications include pipe, wire and cable, siding, and floor tile. *See* pages 18-19, *supra*.

[205] CX 666H *in camera*. The cited capacity utilization levels are for January of each year cited. The 1984 figure is based upon the assumption that bulk and suspension PVC production increased by 12 percent in 1984, as reported by the Society of the Plastics Industry (*see* CX 778C), while capacity did not increase. CPF 17.08 n. 1 *in camera*. Nameplate capacity utilization levels exhibit a similar association with economic conditions, ranging from 88 percent in 1970 to a low of 56 percent in 1975, to a peak of 88 percent in 1978, to a low of 71 percent in 1982, and to an estimated high of 87 percent in 1984. CPF 17.03 *in camera, citing* CX 666H *in camera*.

Respondents argue that there is substantial excess capacity in the PVC industry, as a consequence of producer forecasting errors and the severity of the recent recession. IDF 241–242. Although this was apparently true during the recession, capacity utilization has recently rebounded to a high level. As a result, any incentive to cheat on consensus prices in response to depressed demand is not likely to persist over the next several years. That is particularly true because fixed costs do not generally represent a particularly large percentage of total costs in the PVC market. A 1983 study, for example, estimates that variable costs account for approximately 69 to 76 percent of the total cost of producing PVC resin.[208]

Supply conditions are similarly likely to remain relatively stable and predictable over the next several years. VCM is the primary input used to manufacture PVC, and ethylene and chlorine are in turn the primary inputs used to manufacture VCM. Ethylene is a petroleum compound, and its price is not likely to increase significantly over the next several years, given the fact that petroleum prices have recently declined and are likely to remain low for the foreseeable future. Chlorine prices are also relatively stable, and are likely to remain so for the next several years. **[93]**

b. *VCM Market*

Because 96 percent of all VCM production is used to produce PVC, demand for VCM is closely tied to demand for PVC. In the 1960's, the VCM market grew at an average annual rate of 12 to 15 percent, but that rate declined to 8 to 10 percent in the early 1970's. IDF 313–14; Kienholz, Tr. 792. Industry witnesses indicated that they expect the VCM growth rate to approximate GNP growth (3 to 4 percent annually) for the foreseeable future. IDF 315 *in camera;* IDF 316; Kienholz, Tr. 792.

Capacity utilization levels in the VCM market also vary with general economic conditions, and in particular with conditions in the construction industry. In 1979 the VCM market operated at 96 percent of its practical production capacity, but that level fell to 83 percent in 1980, 77 percent in 1981, and 74 percent in 1982, before increasing to 75 percent in 1983 and to an estimated 92 percent in 1984.[209] Historically, an 80 percent operating rate has permitted VCM producers to earn small profits, while a 90 percent operating rate has permitted them to achieve "longterm reasonable return objectives." Kienholz, Tr. 807.

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[206] Disch, Tr. 691–92; Schaefer, Tr. 1123; Eades, Tr. 1473–74, 1480; H. Wheeler, Tr. 1736–37; CX 220C.

[207] CX 185Z6–Z7 *in camera; accord* Schaefer, Tr. 1124; RX 840B.

[208] RX 1213H *in camera; see* RX 428P *in camera.*

Respondents contend that VCM producers currently confront substantial excess capacity, and that it will persist for the [94] foreseeable future. IDF 323. However, several witnesses testified that the excess capacity developed because of the recession; that capacity utilization improved in 1984; and that it is expected to further improve over the next few years to such an extent that new capacity may be needed by 1990. IDF 325 *in camera;* IDF 326; *see* Kienholz, Tr. 796–97. The 1984 capacity utilization data support that conclusion. Moreover, even lower capacity utilization levels are not likely to place strong downward pressure on prices because fixed costs do not represent a very large percentage of total costs. For example, the 1981 Air Products study indicates that at least 50 percent of total VCM production costs are variable costs. *See* RX 57Z30 *in camera.*

Supply conditions are also likely to remain stable for the next few years. As we observed *supra,* chlorine and ethylene are the primary components of VCM, and prices for both are likely to remain relatively stable for the foreseeable future.

7. Significance of Vertical Integration

The degree to which firms within an input ("primary" or "upstream") industry are integrated into a "secondary" (or "downstream") industry may affect both their incentives to create a coordinated price and output strategy, and their ability to maintain that strategy by detecting and punishing efforts to deviate from it. These two concepts are closely related. For example, firm incentives to coordinate prices and output are likely to be higher if firms believe they will be able to monitor the behavior of their competitors. An acquisition involving one or more integrated firms [95] in either the primary or the secondary market may alter that balance for the firms involved, and thereby frustrate or facilitate collusion in either market.[210]

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[209] CX 665A-F *in camera.* The cited capacity utilization levels are for January of each year cited. The 1984 figure is based upon the assumption that VCM production, like PVC production, increased by 12 percent in 1984. *See* note 205, *supra.* Nameplate VCM capacity utilization levels changed in a similar fashion, from 92 percent in 1979 to a low of 70 percent in 1982 and 1983, and then to an estimated 87 percent in 1984. CX 665A-F *in camera.*

[210] The presence of vertical integration may also affect firm incentives to engage in anticompetitive conduct other than collusion, such as the anticompetitive foreclosure of unintegrated downstream producers from purchasing an input manufactured by previously unintegrated upstream producers. *See* Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price,* 96 Yale L.J. 209 (1986); Salinger, *Vertical Mergers and Market Foreclosure* (Working Paper No. FB–84–17, Graduate School of Business, Columbia University 1985). We do not need to consider other anticompetitive mechanisms in the present case in view of our finding of liability based upon an increase in the likelihood of collusion in the VCM market. In addition, a vertical

(footnote cont'd)

a. *Effects on Firm Incentives to Cooperate*

The effects of vertical integration upon firm incentives to collude will depend upon whether any given integrated firm on balance will benefit from or be harmed by collusion. It is perhaps easiest to appreciate these effects by considering the incentives favoring collusion in the primary (upstream) market—in this case, the VCM market. The foregoing analysis establishes that collusion would be both possible and profitable in the VCM market. Firms that are *not* integrated downstream into the secondary (PVC) market will therefore have a strong incentive to increase primary market prices to supracompetitive levels. VCM producers that *are* integrated downstream are likely to have an equally strong incentive to **[96]** increase VCM market prices, because they can produce either as much VCM as they need—or more than they need—to supply their PVC operations.

First, if integrated VCM producers can manufacture only enough VCM to supply their own PVC operations, then an industrywide increase in VCM market prices will permit them to increase their PVC prices, because nonintegrated PVC producers will have to increase their prices in order to accommodate the VCM price increase.[211] Thus, these integrated firms may actively participate by *reducing* their own captive production. Alternatively, they may passively welcome collusion in the primary market—in the sense that they will profit from declining to increase VCM production in response to higher VCM prices—thereby allowing unintegrated VCM producers to reduce their output and secure higher VCM prices. Second, if integrated firms can produce more VCM than they need for PVC production—and hence can make some open market VCM sales—they will secure additional revenues from an increase in VCM prices. In both of these situations, therefore, integrated firms will have an incentive to support an increase in VCM market prices, and hence to **[97]** support a collusive effort in that market.[212] All integrated VCM producers now fall into one of these two categories (*see* Table II and Table V, *supra*),

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acquisition may reduce the type of inefficiency described in the economic literature on successive monopolies. *See, e.g.*, Waterson, *Vertical Integration, Variable Proportions, and Oligopoly*, 92 Econ. J. 129 (1982). However, this case focuses on a horizontal, rather than a vertical, acquisition.

[211] If the price elasticity of demand for the output is low—as it is for both VCM and PVC—then it will be possible to pass along most or all of the increase in input prices. The increase in VCM market prices will not actually increase the VCM costs of integrated firms, except that the opportunity cost of devoting VCM production to captive PVC output instead of VCM open market sales will increase. The cost of diverting VCM production in this fashion may be substantial, however, especially if no excess VCM capacity is available.

[212] If integrated producers have no incentive to compete away primary market price increases, then unintegrated primary market firms can be fairly sure that their integrated rivals will acquiesce in or support collusion by the unintegrated subset. In this situation, collusion is likely if the number of unintegrated firms is small, even if there are a large number of producers when the integrated firms are also counted. Hence, an acquisition that makes an integrated firm more likely to facilitate or passively accept collusion will increase the likelihood of collusion by unintegrated firms in the primary market. *See* Krattenmaker & Salop, *supra* note 210, at 262 (discussing "Frankenstein Monster").

and therefore have the incentive to support a collusive effort to raise VCM market prices.

If, by contrast, an integrated firm produces more of the secondary market product than it can sustain with its own primary market production, and hence must purchase additional primary market inputs from other firms, that may reduce its interest in higher primary market prices, although its secondary market revenues would still benefit from higher primary market prices. Goodrich found itself in this position prior to the acquisition, when it controlled 1.192 billion pounds of PVC practical production capacity, but only 930 million pounds of VCM practical production capacity. *See* Table VII, *infra*. If some integrated firms can produce more of the primary product than they need while others cannot, their incentives with respect to primary product price levels will differ **[98]** to some degree.[213] None of the integrated VCM producers currently fall in the latter category.

b. *Effects on Firm Monitoring Efforts*

Any firm that participates in a collusive effort—whether it is integrated or not—will prefer to see its competitors keep their prices uniformly and persistently at supracompetitive levels, so that it can both sell its output at supracompetitive prices and secure additional profits by cheating on the consensus. Colluding firms must therefore be able to enforce their consensus by detecting and retaliating against cheating on the consensus.

Vertical integration may affect the extent to which colluding firms can enforce their consensus in two ways. First, if some integrated firms produce more of the primary product than they use internally, nonintegrated primary producers must be able to monitor open market sales of the primary product by integrated firms. This monitoring task is no different from the monitoring required to sustain a collusive arrangement among nonintegrated firms, and conditions in the VCM market permit VCM producers to monitor integrated firm VCM sales. **[99]**

Second, the colluding firms must be able to monitor secondary market sales by integrated firms, because cheating through "reductions" in the "price" of the primary product that integrated firms use internally can take the form of additional secondary market sales. In general, the colluding firms can rely on the integrated firms as a group to monitor their integrated competitors. More precisely, if several firms accounting for a substantial percentage of primary market output are vertically integrated, each can be expected to monitor carefully the secondary market prices of its integrated competitors, and to retaliate quickly if cheating in that market or in the primary market occurs.[214] The speed with which price reduction information reaches nonintegrated producers will increase as the integrated producers' collective share of secondary market share increases. Integrated VCM producers currently account for approximately 50 percent of VCM production.

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[213] However, when downstream producers cannot substitute other inputs for the upstream product, when downstream production is characterized by constant returns to scale, and when downstream markets are competitive, a firm's incentive to collude in the upstream market will not depend upon its downstream market position. *See* White, *Antitrust and Video Markets: The Merger of Showtime and the Movie Channel As a Case Study*, in *Video Media Competition* (E. Noam ed. 1985) (significance of variable proportions production technology).

A second monitoring mechanism allows information on the downstream behavior of the integrated firms to reach nonintegrated upstream producers, so that the nonintegrated firms may participate in policing secondary market cheating by integrated firms. If the nonintegrated VCM producers observe a reduction in orders from their [**100**] nonintegrated PVC producer customers—accompanied by customer complaints of a price squeeze (or complaints that their PVC fabrication customers report a price squeeze)—they can infer that the integrated firms are cheating on the VCM cartel by lowering prices in the PVC market. Moreover, because VCM is such a standardized product, nonintegrated VCM producers are familiar with the cost functions of their integrated rivals, facilitating their ability to distinguish integrated firm cheating from price changes occasioned by changing cost conditions.

c. The Effects of Vertical Integration Upon the VCM and PVC Markets

Table VII describes the degree of integration by ownership into PVC production of VCM producers.[215] Prior to the acquisition, [**101**] firms *not* integrated forward into PVC production controlled 46.9 percent of total VCM practical production capacity (4.165 billion pounds); integrated firms controlled the remaining 53.1 percent. Prior to the acquisition, firms *not* integrated backward into VCM production controlled 44.6 percent of total PVC practical production capacity (2.985 billion pounds); integrated firms controlled the remainder. Prior to the acquisition, Goodrich was the only integrated firm that controlled *less* VCM practical production capacity (930 million pounds) than PVC practical production capacity (1.192 billion pounds).[216] By contrast, Diamond controlled substantially *more* VCM capacity (1.070 billion pounds) than PVC capacity (602 million pounds). After the acquisition, five integrated producers (Diamond and Ethyl exited) accounted for 58.08 percent of total VCM practical production capacity, and 61.2 percent of total PVC practical production capacity. *See* Tables II and V, *supra.* [102]

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[214] Retaliation in the form of increased sales at reduced prices will be most feasible if the retaliating firms are operating along a horizontal section of their marginal cost curves. In that situation, there are no significant capacity constraints upon production increases. Because VCM producers are currently operating at an estimated 90 percent of practical production capacity (*see* page 93, *supra*), there is enough slack—approximately 10 percent of practical production capacity—to make effective retaliation feasible.

[215] In this industry, the crucial stages of production are (a) the manufacture of ethylene dichloride from ethylene and chlorine, (b) its transformation into VCM, (c) the production of PVC resin, and (d) the fabrication of PVC-based industrial and consumer products. The fabrication stage includes the production of PVC compounds from PVC resins.

The significance of vertical integration for competition in the VCM and the PVC markets need only be evaluated with respect to integration by ownership. Respondents contend that the three unintegrated VCM producers have ceded control over major parts of their VCM capacity to unintegrated PVC producers through long term VCM supply contracts. RAB at 76-77; RPF 372 *in camera*. Although firms can transfer corporate control by contract short of integration by ownership, such a result would require the contractual allocation of the great majority of firm capacity. Functional integration is not created by long term contracts involving much smaller percentages of capacity. *Compare* RPF 371 *in camera with* RPF 374 *in camera*. Moreover, these contracts typically give the firms the cover independent discretion as to the quantities they will buy or sell, and their customers and sources of supply. *See* pages 21-22, *supra*.

TABLE VII

Vertical Integration

January, 1982

Firm[217]	**VCM Practical Production Capacity**	**PVC Practical Production Capacity**
Dow	1.945 (1st)	—
Shell	1.385 (2nd)	—
Diamond Shamrock	1.070 (3rd)	0.602 (4th)
Ga. Pacific	1.000 (4th)	0.600 (5th)
Goodrich	0.930 (5th)	1.192 (1st)
PPG	0.835 (6th)	—
Conoco	0.650 (7th)	0.585 (6th)
Borden	0.472 (8th)	0.420 (8th)
Ethyl	0.300 (9th)	0.120 (12th)
Formosa	0.286 (10th)	0.196 (11th)
Tenneco Polymers	—	0.785 (2nd)
Shintech	—	0.720 (3rd)

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[216] Because it takes 1.02 to 1.04 pounds of VCM to produce 1 pound of PVC resin (Disch. Tr. 643), VCM and PVC practical production capacities can be compared essentially on a one for one basis.

[217] The listed firms are those that were producing VCM and/or PVC as of 1982. The capacity figures are expressed as billions of pounds. The data are derived from Table I and Table IV, *supra.*

Occidental Chemical	—	0.556 (7th)
Air Products	—	0.310 (9th)
CertainTeed	—	0.220 (10th)
Other	—	0.394
Total	8.673	6.700 **[103]**

The acquisition strengthened the incentives of VCM producers to collude, and improved their ability to enforce such a consensus. Prior to the transaction, Goodrich and Diamond were both vertically integrated producers, but Goodrich was a net VCM buyer—with less VCM capacity than PVC capacity—while Diamond was a net VCM seller—with more VCM capacity than PVC capacity.[218] As a result, Goodrich had a significant interest in somewhat lower VCM prices that conflicted to some degree—but did not override—its interest in higher PVC prices. After the acquisition, Goodrich controlled 23.7 percent of VCM practical production capacity (1.997 billion pounds), and 19.4 percent of PVC practical production capacity (1.34 billion pounds). The merged entity became a substantial net VCM *seller*—with greater VCM capacity than PVC capacity—to an even greater degree than Diamond had been before the acquisition.[219] By removing Goodrich as an integrated net buyer of VCM, and any incentive it might otherwise have had to secure lower VCM prices, the acquisition increased the incentive of the merged entity to collude in the VCM market, or at least to passively **[104]** welcome collusion by the unintegrated VCM producers.[220] Removing Goodrich's incentive to thwart a collusive VCM price increase is of particular concern because there are only three unintegrated VCM firms. Coordinated action by the unintegrated VCM producers is therefore substantially more likely to occur.

In order to establish that vertical integration will not defeat collusion in the primary market, it is not enough, however, to establish that nonintegrated VCM producers have a strong incentive to collude and that integrated producers have an incentive to actively support or acquiesce in such a collusive effort. In addition, participating firms must be able to enforce the terms of their collusive effort, and as a part of that effort must be able to monitor the conduct of their competitors. As the *DOJ Guidelines* indicate,

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[218] In 1981, Goodrich produced 843.962 million pounds of PVC (16.1 percent of 5.242 billion pounds), and 774.728 million pounds of VCM (11.3 percent of 6.856 billion pounds). By contrast, Diamond produced 435 million pounds of PVC (8.3 percent of 5.242 billion), and 921.446 million pounds of VCM. *See* Tables I and IV, *supra*.

[219] In 1983, Goodrich produced 1.0368 billion pounds of PVC (18.4 percent of 5.635 billion pounds), and 1.5655 billion pounds of VCM (22.26 percent of 7.033 billion pounds). *See* Tables II and V, *supra*.

[220] Even if the PVC market were perfectly competitive, anticompetitive conduct in the VCM market could create power over price in the PVC market by in effect creating an involuntary PVC cartel; that is, by forcing all PVC producers to raise price in a coordinated fashion, whether or not a voluntary PVC cartel could have formed. *See generally* Salop and Scheffman, *infra* note 240. In other words, the increase in PVC prices requires a downward sloping *market* demand curve but not downward sloping *firm* demand curves.

> [c]ollusive agreements are more likely to persist if participating firms can quickly detect and retaliate against deviations from the agreed prices or other conditions. Such deviations are easiest to detect, and therefore less likely to occur, in markets where detailed information about specific transactions or individual price or output levels is readily available to competitors.

DOJ Guidelines at ¶3.42. **[105]**

The record evidence suggests that VCM producers could successfully enforce the terms of a collusive arrangement. Nonintegrated and integrated VCM producers can and do successfully monitor VCM market prices. Most VCM is sold pursuant to written long-term contracts at least one year in length.[221] Most such contracts permit the seller to reset the contract price over the contract term, and most of them also require the seller to provide notice of price increases a prescribed number of days in advance.[222] In some VCM contracts, the price to be charged is determined with reference to VCM prices charged by other firms in the VCM market.[223] Most VCM contracts also contain meeting competition clauses, pursuant to which a buyer that receives an offer of a lower price from a competing seller is obligated to report that price to the contracting seller and give the contracting seller an opportunity to match it.[224] Moreover, in VCM sales relationships not **[106]** involving written contracts, buyers frequently permit current suppliers to meet competitive offers. IDF 298. These provisions—whether formally contractual or not—give VCM buyers a strong incentive to monitor industry transactions for price concessions, and increase the likelihood that whenever a seller offers a concession to a buyer, other sellers will discover it and retaliate. Industrywide use of these clauses therefore discourages price reductions or other concessions in the VCM market.[225] As a result of these contractual provisions, VCM suppliers secure a considerable amount of price information through their customers. IDF 298, *citing* Kienholz, Tr. 810–811.

VCM suppliers also learn of competitive price changes through public announcements in the trade press.[226] In addition, many VCM sales are made pursuant to sales, tolling and exchange agreements between VCM competitors,[227] in part because integrated VCM sellers both buy and sell VCM. These agreements facilitate the exchange of price information among VCM producers.[228] In [**107**] particular, because VCM contract prices are frequently subject to negotiation based upon changes in market prices, sales, tolling, and exchange agreements between VCM sellers create a forum for discussing industry prices. For example, one Goodrich document indicates that an employee of a competing VCM seller called in late 1982 "to discuss the average VCM prices now prevailing in the marketplace . . ." CX 217C *in camera*.

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[221] IDF 296 *in camera, citing* Taylor, Tr. 1663–68; L. Wheeler, Tr. 958 *in camera;* IDF 305 *in camera, citing* Weber, Tr. 1839–40; Kienholz, Tr. 811–812; Taylor, Tr. 1592–93; Schaefer, Tr. 1145.

[222] IDF 296 *in camera, citing* Goodrich Admissions 507, 509; CX 4Z–40; IDF 300 *in camera, citing* Wheeler, Tr. 958–960 *in camera;* CX 702; CX 705; CX 707; CX 735; CX 736; CX 739; IDF 317; Taylor, Tr. 1596.

[223] IDF 297 *in camera, citing* Schaefer, Tr. 1223 *in camera;* CX 88X-Y *in camera.*

[224] IDF 296 *in camera, citing* Wheeler, Tr. 958–960 *in camera;* CX 88X-Y *in camera;* IDF 317; Kienholz, Tr. 811–813; *see* Taylor, Tr. 1596–97.

[225] *See* Kienholz, Tr. 811; *see also* Schaefer, CX 295Z30 *in camera; see generally United States v. FMC Corp.*, 306 F.Supp. 1106, 1112 (E.D. Pa. 1969); Salop, *supra* note 58 at 27–30; Clark, *supra* note 58 at 934–935.

As a consequence of the wide availability of price information, particularly through meeting competition clauses and supply interrelationships, VCM firms are generally able to secure relatively reliable and accurate VCM price information.[229] Hence, for example, a number of VCM sellers were familiar with the terms of a specific VCM supply contract between Dow and Air Products.[230] Furthermore, VCM producers monitor the market shares, capacity, and changes in capacity of their VCM competitors.[231]

It is conceivable in some industries that purchasing firms will recognize that meeting competition clauses may facilitate [**108**] seller collusion, and will therefore prefer to switch suppliers—in response to offers of lower prices from rivals—rather than report the offers to existing suppliers. Such conduct is unlikely in the VCM market, primarily because it is costly to switch from one supplier to another. VCM is a highly volatile gaseous chemical. Approximately 50 percent of the VCM sold in the United States is transported by pipeline from suppliers' plants to their customers' premises.[232] Pipeline transportation is cheaper and safer than transportation by barge or tank car.[233] As a result, once such a pipeline is in place, the cost savings it produces make it highly unlikely that a VCM customer will switch to another supplier.[234] The record evidence also establishes that non-pipeline customer/supplier relationships tend to be stable over time.[235] In short, most VCM buyers prefer to stay with their current suppliers.[236] Thus, most VCM buyers will report offers of lower prices to their current suppliers so **[109]** that they can match them. In conjunction with the supply interrelationships described above, the active assistance of VCM purchasers permits VCM producers easily to detect cheating on *external* VCM prices in the open VCM market by competing VCM producers—whether integrated or not.

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[226] IDF 299, *citing* CX 736; CX 737; CX 739.

[227] L. Wheeler, Tr. 972–75 *in camera*; CX 557Z11 *in camera*.

[228] IDF 301 *in camera*, *citing* DiLiddo, Tr. 3295 *in camera*, Tr. 3299; CX 88 *in camera*; CX 24 *in camera*; CX 26 *in camera*; CX 206A; CX 207; CX 208; CX 212; CX 213; CX 214; CX 215; CX 217 *in camera*.

[229] IDF 302, *citing* Diamond Admission 535; CX 6V, Z67.

[230] IDF 303, *citing* Kienholz, Tr. 853–56; H. Wheeler, Tr. 1020–24 *in camera*; Schaefer, Tr. 1193–95; DiLiddo, Tr. 3306–09.

[231] IDF 304, *citing* Diamond Admission 523; CX 6V, Z–66; CX 169F; CX 971 *in camera*; CX 146; CX 215; CX 238E; CX 425.

[232] IDF 307, *citing* H. Wheeler, Tr. 989; Taylor, Tr. 1564.

[233] IDF 307, *citing* Kienholz, Tr. 756, 759–60; 789; L. Wheeler, Tr. 980–981; Taylor, Tr. 1563–64; Schaefer, Tr. 1129.

[234] IDF 307, *citing* Kienholz, Tr. 787–88, 790, 868–70; Taylor, Tr. 1566–67.

Both integrated and nonintegrated VCM producers can also monitor cheating by integrated VCM producers—with respect to *internal* VCM "prices"—by observing the prices of PVC. Because they are intimately familiar with both VCM and PVC production processes, and are participants in both the PVC and VCM markets, integrated firms can easily detect cheating with respect to either VCM or PVC prices by their rivals. Nonintegrated VCM producers can rely upon their customers to quickly detect and report PVC price reductions.[237] As noted *supra*, most PVC is sold pursuant to long term contractual or "handshake" relationships that typically contemplate price and output changes on a monthly basis.[238] These arrangements almost invariably provide—either expressly or implicitly—that PVC purchasers are to notify their suppliers of offers of lower prices by competing suppliers, and are to give their suppliers an opportunity to **[110]** match those prices.[239] In addition, suppliers are aware of other suppliers' prices because they frequently exchange or toll PVC with one another. CPF 7.15. PVC suppliers are very likely, in turn, to report any PVC price reductions to their VCM suppliers

Additional upstream or downstream integration on the part of any of these producers might make price and output monitoring somewhat more difficult. However, that does not appear to be the case in this industry. On the upstream side, integration into chlorine production is unlikely to complicate monitoring. In 1983, firms accounting for 80 percent of total VCM practical production capacity were integrated backward into chlorine production; only Borden, Shell and Conoco were not so integrated. RX 246. On the downstream side, it is true that most PVC resin producers have some facilities for compounding and/or fabricating PVC. However, respondents have adduced no evidence indicating that these facilities together account for more than a small proportion of total PVC resin. **[111]**

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[235] IDF 308 *in camera*, *citing* Kaserman, Tr. 2500; Schaefer, Tr. 1145; CX 523T *in camera*; CX 419.

[236] IDF 306 *in camera*, *citing* Taylor, Tr. 1567–68; Schaefer, Tr. 1145.

[237] As noted *supra*, the fact that integrated producers account for a large percentage of PVC market sales makes it more likely that nonintegrated PVC producers will receive PVC price information concerning integrated producers quickly.

[238] IDF 211 *in camera*; IDF 219 *in camera*; Disch, Tr. 685.

[239] IDF 211 *in camera*, 237 *in camera*; Disch, Tr. 684; DiLiddo, Tr. 3254–55, Weber Tr. 1789–90. PVC buyers are very likely to report such offers to their suppliers because it is costly to switch suppliers, and they will therefore prefer to remain with their current suppliers. *See* page 88 and note 202, *supra*.

In short, both integrated and nonintegrated VCM producers have strong incentives to create and maintain a collusive arrangement, and can readily detect cheating from that arrangement and retaliate accordingly. In reaching this conclusion, it is important to emphasize and summarize the mechanism through which VCM producers could collude successfully. They collectively control an input that is essential to PVC production; that is highly homogeneous; that has a low price elasticity of demand; and that can be produced pursuant to a standardized technology available to all incumbent producers. In particular, the demand for PVC is sufficiently inelastic to make it likely that an increase in VCM prices can profitably be passed along to PVC customers. Anticompetitive conduct in the VCM market that raises the VCM price to all PVC producers will shift the supply curve of each downstream firm upward, and thereby increase the equilibrium price of PVC, because the demand curve for PVC is downward sloping.[240] This will occur even if the PVC market is perfectly competitive (and the record evidence does not in any event support that view).[241] **[112]**

As a result, VCM producers can effectively manage a collusive arrangement not only within the VCM market, but within the PVC market as well. This is true despite the fact that it would be difficult to collude successfully in the PVC market alone, for the reasons summarized below. It is therefore incorrect to argue, as the respondents do, that it is impossible to collude in the VCM market because it is impossible to collude in the PVC market. It is rather possible for VCM producers to create and maintain a collusive arrangement in the PVC market, notwithstanding some of its structural characteristics, because it is possible to create and maintain a collusive arrangement in the VCM market.

D. *Conclusion*

1. PVC Market

The HHIs and four-firm concentration ratios for the PVC market after the acquisition were just barely high enough to surpass the thresholds specified in earlier Supreme Court and Commission cases, as well as the thresholds at the lower end of the "moderately concentrated" range of the *DOJ Guidelines*. The concentration levels therefore create only a weak presumption of anticompetitive effects from the acquisition in the PVC market. [113] We are persuaded that the structural evidence, on balance, rebuts this weak presumption and establishes that the acquisition is unlikely to lessen competition substantially in the PVC market, for three reasons. First, PVC resin is relatively heterogeneous. Several grades of PVC resin are needed for different end use applications, different PVC producers manufacture different amounts of each grade, and an effective collusive strategy would require reaching an agreement on price and output levels for each grade. Moreover, even within any particular PVC resin grade, quality varies from one PVC producer to another, making effective collusion even more difficult.

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[240] This is true because, as noted *supra*, all current and potential PVC producers need VCM as an input. *See generally* Krattenmaker & Salop, *supra* note 210; Salop and Scheffman, *Raising Rivals' Costs*, 73 Am. Econ. Rev. 267 (1983). *Compare DOJ Vertical Restraints Guidelines* ¶3.21 (facilitating collusion).

[241] Even if the PVC market were perfectly competitive, anticompetitive conduct in the VCM market could create power over price in the PVC market by in effect creating an involuntary PVC cartel; that is, by forcing all PVC producers to raise price in a coordinated fashion, whether or not a voluntary PVC cartel could have formed. *See generally* Salop and Scheffman, *supra* note 240. In other words, the increase in PVC prices requires a downward sloping *market* demand curve but not downward sloping *firm* demand curves.

Second, costs vary significantly from one firm to another, primarily because different firms' operating costs vary as a function of the use of large and small reactors, and the fact that different firms emphasize the production of different PVC resin grades. Transportation cost differences represent an additional complicating factor. Third, although the price elasticity of demand for PVC is, on balance, relatively low, an effort on the part of PVC producers to raise PVC prices to supracompetitive levels may be constrained to some degree by the higher price elasticity of demand for many PVC end use products, and made more difficult by variations in price elasticity from one PVC end product to another.[242] [114]

2. VCM Market

The record evidence indicates that the HHIs and four-firm concentration ratios for the VCM market after the acquisition lay well above the concentration levels specified in earlier Supreme Court and Commission cases, and reached the upper end of the "moderately concentrated" range in the *DOJ Guidelines*. Moreover, the acquisition increased three different measures of HHI levels by 226 to 304 points. The concentration levels therefore create a relatively strong presumption that the acquisition substantially lessened competition in the VCM market.

The structural factors in the VCM market described above strengthen rather than rebut this presumption. First, impediments and one barrier to entry into the VCM market are sufficiently high to permit incumbent firms with market power to sustain supracompetitive prices for several years. Second, VCM is a highly homogeneous product; only one grade is used to produce PVC resin. Third, the price elasticity of demand for VCM is very low. Fourth, cost functions and raw materials and transportation costs do not differ significantly from one VCM producer to another. Fifth, the size and distribution of VCM buyers are not likely to constrain the pricing discretion of VCM producers. Sixth, although contracts in the VCM market typically [115] cover at least one year, prices and output levels are renegotiated frequently—pursuant to both contractual and "handshake" relationships—and meeting competition clauses in the contracts keep sellers informed of the pricing behavior of their rivals. Seventh, although some excess capacity confronted VCM producers during the recession, capacity utilization levels have now approached their prerecession levels, and most experts expect any remaining disparity to disappear completely by the 1990's. Demand is expected to grow at a relatively healthy annual rate of 3 to 4 percent. As a result, capacity utilization levels are likely to remain well above the 80 percent "break even" level for the foreseeable future. Supply conditions are also likely to remain stable. Finally, vertical integration between VCM and PVC producers is likely to facilitate efforts to collude in the VCM market. These factors strengthen the conclusion that the acquisition is likely to substantially lessen competition in the VCM market.

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[242] Commissioner Azcuenaga points out that because the price elasticity of demand for PVC is relatively low, PVC producers—as well as VCM producers—"could pass on a collusive PVC price increase." *Azcuenaga Opinion* at 15. That in fact is an important reason why *VCM* producers could collude successfully. *See* pages 110-111, *supra*. However, the fact that *PVC* producers *could* pass on a cost increase does not mean that they will be able to determine and maintain a set of consensus prices, in light of the heterogeneity of PVC resins, and cost differences from one PVC producer to another.

V. PERFORMANCE FACTORS

An important part of the respondents' defense to the allegations in the complaint in this matter is summarized in their answering brief:

> Throughout these proceedings an undeniable truth has stymied complaint counsel: the PVC industry was intensely competitive before The BFGoodrich Company (Goodrich) acquired one polyvinyl chloride (PVC) plant and one vinyl chloride monomer (VCM) plant from Diamond [116] Shamrock Chemicals Company (Diamond) in January 1982 and has been intensely competitive since the acquisition.

RAB at 1. Respondents recognize that a finding of actual anticompetitive effects is not needed to establish that the acquisition violates section 7 of the Clayton Act (*id.* at 2); establishing that the acquisition may substantially lessen competition is sufficient. However, respondents argue that actual post-acquisition evidence of industry performance is sufficient to rebut other evidence satisfying the latter standard. *Id.* at 3–8.

The Commission has concluded that the respondents' performance evidence does not rebut its finding of liability in the VCM market. Post-acquisition performance evidence must be evaluated very carefully, because of its potential for manipulation. Much of the record evidence of competition respondents adduce is not persuasive, particularly with respect to the VCM market. Moreover, there is no guarantee that the limited price competition that respondents have identified will continue now that demand and supply conditions in both the VCM and the PVC markets have improved. Furthermore, whatever probative value respondents' post-acquisition performance evidence might have is outweighed by the probative value of the post-acquisition structural evidence in the record.

> The Supreme Court has determined that post-acquisition evidence tending to diminish the [117] probability or impact of anticompetitive effects might be considered in a Section 7 case.[243]

However, in making that determination, the Court has noted that the "probative value" of such evidence is "extremely limited." As the Court observed:

> If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a Section 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending.[244]

The Seventh Circuit has more recently confirmed that "[p]ost acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight."[245] Similarly, the Commission has determined that it is inappropriate to consider "exculpatory post-acquisition evidence of voluntary actions by the acquiring firm" in determining the legality of an acquisition.[246] For similar reasons, the conclusory testimony of [118] industry executives to the effect that their industry is "competitive" is not particularly useful and cannot be given much weight.[247] The probative value of performance evidence is also limited by its susceptibility to transitory economic conditions, such as a recession. For example, the fact that profits are low in an industry with excess capacity does not necessarily mean that industry pricing is competitive.[248] Furthermore, the absence of "concrete anticompetitive symptoms" does not mean that

> competition has not already been affected, "for once the two companies are united no one knows what the fate of the acquired company and its competitors would have been

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[243] *United States v. General Dynamics Corp.*, 415 U.S. 486, 504 (1974), *citing FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 *et seq.*, 602 *et seq.* (1957); *United States v. Continental Can Co.*, 378 U.S. 441, 463 (1964); *accord, Weyerhaeuser Co.*, 06 FTC at 284 n.59.

[244] *United States v. General Dynamics Corp.*, 415 U.S. at 504–05.

[245] *HCA v. FTC*, 007 F.2d at 1384, *citing Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 276 (7th Cir. 1981).

[246] *HCA*, 106 FTC at 486 n.17.

[247] *British Oxygen Co.*, 86 FTC 1241, 1365 n.28 (1975), *rev'd and remanded on other grounds sub nom. BOC International Ltd. v. FTC*, 557 F.2d 24 (2d Cir. 1977); *see also United States v. Philadelphia National Bank*, 374 U.S. at 366–67.

[248] Klass, Tr. 5725–27; Kaserman, Tr. 2446–48. An additional complication is that the accounting profit data usually available from industry firms is much less accurate measure of industry performance than economic profits data, and frequently diverges quite significantly from economic profit data. *B.A.T. Industries, Ltd.*, 104 FTC 852 (1984).

but for the merger."[249]

Recent Commission decisions have carefully followed these principles in evaluating post-acquisition performance evidence. In *Champion Spark Plug*, in evaluating a potential competition case, Judge Timony considered evidence suggesting that the **[119]** acquired firm had been suffering from low and declining profits, but only in conjunction with structural evidence showing that (1) its share of the relevant market had declined from 45.1 percent to 34.3 percent during the same period; and (2) entry barriers were low, and seven new firms had recently entered the relevant market.[250] Similarly, in *BASF Wyandotte Corp.*, another potential competition case, Judge Hyun relied heavily upon structural evidence that "entry of new firms" was unimpeded; small firms in the relevant market were growing rapidly; and the acquisition eliminated only *de minimis* potential competition.[251]

Still more recently, the Commission has confirmed that the presence of some degree of competition does not necessarily refute the inference of the likelihood of anticompetitive effects created by relevant structural and behavioral evidence. In *HCA*, the Commission stated:

> It is true that the undisputed evidence shows that more vigorous competition, including more direct price competition, is emerging in the health care industry, but it is a fallacy to conclude that growing competition in health care markets means that these acquisitions pose no threat to that competition. In fact, it is just that emerging competition that must be protected from mergers that facilitate the suppression of such competition.[252] **[120]**

Similarly, the *DOJ Guidelines* advise that "[t]he fact that the market is currently competitive casts little light on the likely effect of the merger." *DOJ Guidelines* at ¶3.45.

A. *PVC Market*

Judge Howder concluded with respondents that the PVC industry performed in a relatively competitive fashion prior to the acquisition, and has continued to perform in that fashion since the acquisition. For example, Judge Howder noted that in a 1982 document, Goodrich informed its sales people that the

> PVC industry is not healthy. Red ink continues to flow.[253]

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[249] *United States v. General Dynamics Corp.*, 415 U.S. at 505, *quoting FTC v. Consolidated Foods Corp.*, 380 U.S. at 598.

[250] *Champion Spark Plug*, 103 FTC 546, 628–30 (1984). The Commission adopted Judge Timony's decision and order as its own. *Id.* at 639–40.

[251] *BASF Wyandotte Corp.*, 100 FTC 261, 428–429 (1982).

[252] *HCA*, 106 FTC at 501–02.

[253] IDF 247 *in camera*, *quoting* RX 186F *in camera*.

Respondents similarly maintain that during the recession, the PVC market suffered from "substantial excess capacity and poor financial returns" (RPF 353 *in camera*), and that profits in the PVC industry have been poor since the acquisition.[254] A number of industry witnesses testified that the PVC industry is highly competitive. IDF 248.

Two factors limit the probative value of this evidence. First, respondents' basis for their conclusion that the PVC industry is competitive is for the most part simply the testimony **[121]** of industry representatives. Industry executives, well aware of the antitrust laws, are unlikely to testify otherwise. Second, much if not all of the "excess capacity and poor financial returns" respondents identify is probably attributable to the 1982 recession. *See* IDF 74. There is no guarantee that the price competition that respondents have identified will continue, now that industry demand is expanding again, and PVC producers are once again operating at relatively high capacity levels. *See* IDF 75.

We need not evaluate respondents' performance evidence for the PVC market in any greater detail, however, because we have concluded that the acquisition is not likely to lessen competition substantially in the PVC market.

B. *VCM Market*

Respondents similarly argue that the VCM market is "highly competitive," and that the VCM business has been characterized by intense competitive pricing, and "has been unprofitable in the recent past."[255] However, respondents' performance evidence does not rebut the Commission's finding of liability in the VCM market, for three reasons. First, respondents' primary basis for these conclusions is the generalized testimony of VCM industry representatives that the industry is competitive and the **[122]** acquisition "did not enhance the likelihood of anticompetitive behavior." RPF 460–66 *in camera*. Given the interest of industry participants in establishing that their industry is highly competitive, this sort of generalized testimony is not particularly probative.

Second, the dramatic effects of the recession make it difficult to rely upon respondents' performance evidence, because the business downturn probably would have forced even a monopolist to reduce prices. There is no guarantee that the limited competition that respondents assert exists will continue now that demand conditions have improved substantially. Evidence from earlier periods suggests that the recession probably had only transitory effects on price and profit levels. For example, a 1977 Goodrich document states:

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[254] RPF 355 *in camera, citing* CX 527; CX 186F; RX 132C; RX 7160; Disch, Tr. 706–07; H. Wheeler, Tr. 1736; DiLiddo, Tr. 3250, 3419.

[255] RPF 460–463 *in camera, citing* RX 428E *in camera;* Disch (Tenneco), Tr. 697–99, Kienholz (PPG), Tr. 849–50; L. Wheeler (Shell), Tr. 991, 1025, 1051; Taylor (Dow), Tr. 1672; H. Wheeler (GenCorp), Tr. 1766–67; DiLiddo (Goodrich), Tr. 3327.

> The market conditions are such that the suppliers of EDC [ethylene dichloride] and VCM are in a strong position to control the price and terms under which these materials are purchased.

CX 17Z14 *in camera*. Similarly, a 1978 Occidental document complains about "[s]trong market place discipline by the VCM producers." CX 524V *in camera*. And a 1980 Firestone document concludes that

> the Company's monomer [VCM] suppliers were able to demand prices resulting in high profits for themselves regardless of the conditions of the polymer market upon which the Plastics Division was dependent for its profit.

CX 503B. [**123**]

Third, the post-acquisition structural evidence makes respondents' post-acquisition performance evidence less persuasive. Since the acquisition, the number of firms in the VCM market has declined from eleven to nine; the HHI for nameplate capacity has increased from 1529 to 1632 as of January 1985; and practical production capacity has increased from 1552 to 1650.[256] For these reasons, respondents' performance evidence does not rebut the presumption of anticompetitive effects drawn from the structural data.

VI. RELIEF

The attached final order is designed to remedy the anticompetitive effects arising from the acquisition. More particularly, paragraph II of the order directs Goodrich to divest the VCM Plant located at La Porte, Texas—together with associated assets, rights and privileges secured from Diamond, and all additions and improvements added by Goodrich—within one year of the effective date of the order. Divestiture is to be made subject to the prior approval of the Commission. Paragraph III requires Goodrich to provide the acquirer with technology relating to the plant, and to provide VCM know-how for a period of one year. These requirements are reasonably related to ensuring that the La Porte VCM Plant is reestablished as a [**124**] viable competitive entity.[257] Paragraph IV requires Goodrich to assign all sales and supply contracts for the plant to the acquirer. Paragraph V provides for the appointment of a trustee to divest the plant if Goodrich fails to comply with the divestiture requirements.

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[256] *See* pages 58–61, *supra;* IDF 266.

[257] *See, e.g., Kaiser Alum. & Chem. Corp.*, 93 FTC 764, 855–58 (1979), *remanded on other grounds*, 652 F.2d 1324 (7th Cir. 1981); *Ekco Products Co.*, 65 FTC 1163, 1212–15 (1964), *aff'd*, 347 F.2d 745 (7th Cir. 1965).

Paragraph VI prohibits Diamond from interfering with the relief the order prescribes, and for a period of five years requires Diamond to continue to provide utilities and other support services previously provided to the La Porte VCM Plant, and to afford the plant continued access to and use of the pipelines connected to the plant. Paragraph VII requires Goodrich—for a ten-year period—to secure Commission approval prior to making certain acquisitions of VCM manufacturing assets in the United States. Paragraph IX provides in particular that prior Commission approval is required prior to retransfer of the VCM plant from Goodrich to Diamond, and—for a period of three years—prior to its divestiture by Diamond to a third party. Finally, paragraphs VIII, X, and XI impose notification and reporting requirements upon both respondents.

The relief embodied in the order is reasonably related to the violation of section 7 of the Clayton Act that the Commission has identified. In section 7 cases, the principal **[125]** purpose of relief "is to restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger."[258] In this case, divestiture of the La Porte VCM plant represents the most effective means of achieving that objective.[259] As long as Goodrich continues to operate the La Porte VCM Plant, the anticompetitive effects identified *supra* will persist. For similar reasons, the Commission directed the divestiture of the acquired assets in *AMI* and *HCA*.[260]

A ten-year prior approval provision is warranted in this case with respect to Goodrich because of the structural characteristics of the VCM market. If Goodrich divests the La Porte VCM Plant to a firm not currently in the United States VCM market—the divestiture that would reduce market concentration most significantly—the HHI for nameplate capacity would fall to approximately 1350. *See* Table V, *supra*. Without the La Porte VCM Plant, Goodrich will own one VCM plant—located at Calvert City, Kentucky—with a nameplate capacity of one billion pounds. *See* page 5, *supra*. In 1984, this represented **[126]** approximately 11 percent of total domestic VCM nameplate capacity. If Goodrich were then to acquire the smallest domestic VCM producer —and in 1984 that was Conoco (now Vista), with a nameplate capacity of 6.78 percent (*see* Table V, *supra*)—its share would rise to 17.78 percent, and the relevant HHI for nameplate capacity would increase by approximately 150 points, to 1500. Such an acquisition would almost certainly violate section 7 of the Clayton Act, for essentially the same reasons that Goodrich's acquisition of the La Porte VCM plant constitutes a violation of section 7. As the Commission has previously indicated, "it is industry market structure and market conditions . . . that determine the appropriateness of imposing a prior approval requirement in a section 7 case."[261] Here, the prospect that *any* acquisition by Goodrich of any firm in the United States VCM market would almost certainly violate section 7 warrants the prior approval requirement.

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[258] *RSR Corp.*, 88 FTC 800, 893 (1976), *aff'd*, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *see Brunswick Corp.*, 96 FTC 151, 155 (1980), *aff'd sub nom. Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

[259] *See Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972); *HCA*, 106 FTC at 513; *AMI*, 104 FTC at 221; *RSR Corp.*, 88 FTC at 893.

[260] *HCA*, 106 FTC at 513; *AMI*, 104 FTC at 226–27.

Several factors make it essential to require Diamond to comply with certain provisions of the order. Pursuant to the Goodrich/Diamond purchase agreement, a Commission order requiring Goodrich to divest the La Porte VCM plant will permit Goodrich to require Diamond to reacquire the plant. CX3Z505-Z507, cl. 4 *in camera*. The agreement also gives Diamond a right of first refusal to purchase the stock or assets of DSPC, including the La Porte VCM plant, in the event of a divestiture order. *Id.* **[127]** Diamond has indicated that if it were required to reacquire the assets it sold to Goodrich, it would operate them "only until [it] could resell the assets to someone who is committed to being in the plastics business . . ."[262] Because the La Porte plant is approximately the same size as Goodrich's Calvert City VCM plant, its conveyance to any firm in the VCM market would raise concerns similar to those that would be attributable to any other acquisition by Goodrich in that market. The order therefore requires prior Commission approval of any subsequent divestiture of the La Porte plant by Diamond within three years after Diamond reacquires the plant. The order also prohibits Diamond from interfering with the divestiture because, through its right of first refusal, Diamond could theoretically prevent Goodrich from divesting the La Porte VCM plant to another buyer.[263] Order provisions of this sort—directed against the seller in an acquisition that violates section 7 of the Clayton Act—may be imposed when necessary to implement effective relief.[264] **[128]**

The Commission believes that the foregoing order provisions lie well within its authority. The general standard is that "the courts will not interfere [with a Commission order] except where the remedy selected has no reasonable relation to the unlawful practices found to exist."[265] Once "the government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor."[266]

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[261] *HCA*, 106 FTC at 514; *accord*, *AMI*, 104 FTC at 221-227.

[262] Diamond Shamrock Chemicals Company Motion for Dismissal and Supporting Argument (Aug. 31, 1984), at 12.

[263] If Diamond has accurately portrayed its disinterest in reacquiring the plant, then it is unlikely, however, to interfere with the sale of the plant to another party.

[264] *See Dean Foods Co.*, 70 FTC 1146, 1293-94 (1966), *modified as to order*, 71 FTC 731 (1967); *see also United States v. Coca Cola*, 575 F.2d 222, 227-31 (9th Cir.), *cert. denied*, 439 U.S. 959 (1978) (sellers may be included in section 7 remedies). There is thus no need to address complaint counsel's alternative argument (*see* CAB at 71) that the agreement to "dismantle" DSPC violated section 5 of the Federal Trade Commission Act.

VII. CONCLUSION

A. *PVC Market*

The Commission has determined to affirm the decision of Judge Howder with respect to the PVC market. Environmental restrictions have created higher costs for new entrants and expansion than confronted incumbent capacity, and thus constitute a barrier to entry sufficiently substantial to make collusion within the PVC market feasible.[267] However, other structural factors establish that, on balance, the acquisition is not likely to have anticompetitive effects in the PVC market. The **[129]** acquisition increased market HHIs to only 1098 for nameplate capacity, 1079 for practical production capacity, and an estimated 1020 for actual production levels. *See* pages 54–55, *supra*. As we noted *supra*, these post-acquisition concentration data are only barely sufficient to create a presumption of anticompetitive effects in the PVC market. Because they fall within the lower end of the mid-range of the Department of Justice Merger Guidelines, the Commission must carefully evaluate a number of other industry characteristics in order to determine whether the acquisition may in fact substantially lessen competition.[268]

On balance, other industry characteristics refute the weak presumption of anticompetitive effects in the PVC market created by the concentration data. First, PVC is relatively heterogeneous. Second, costs vary significantly from one PVC producer to another, as a consequence of differing reactor sizes, resin production emphases, and transportation costs. Third, the higher price elasticity of demand for some PVC end products may constrain any effort among PVC producers to collude. These industry characteristics make it unlikely that the acquisition had any anticompetitive effects in the PVC market.

B. *VCM Market*

The Commission has determined to reverse the decision of Judge Howder with respect to the VCM market. Environmental **[130]** restrictions that create higher costs for new entrants and expansion than confronted incumbent capacity constitute a barrier to entry.

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[265] *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946); *accord, e.g., HCA v. FTC*, 807 F.2d at 1393.

[266] *United States v. E.I. DuPont de Nemours & Co.*, 366 U.S. 316, 334 (1961).

[267] *E.g., FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1163–64 (9th Cir. 1984); *Marathon Oil Corp. v. Mobil Corp.*, 669 F.2d 378, 380–81 (6th Cir. 1981); *see Weyerhaeuser Co.*, 106 FTC at 287.

[268] *Weyerhaeuser Co.*, 106 FTC at 280.

Moreover, the substantial time required to enter, the need to capture a substantial share of industry sales in order to achieve minimum economies of scale, and the sunk character of an entry investment constitute impediments to entry. These constraints are sufficiently substantial to make collusion within the VCM market feasible.[269] Moreover, the acquisition substantially increased concentration in the VCM market: by 226 points to 1529 for nameplate capacity; by 253 points to1552 for practical production capacity; and by 304 points to 1663 for actual production levels. *See* page 61, *supra*. The acquisition raised four-firm concentration levels to 70.8 percent for nameplate capacity, 71.3 percent for practical production capacity, and 72.59 percent for actual production levels. *See* Table V, *supra*. These concentration data create a relatively strong presumption of anticompetitive effects.[270] **[131]**

The other structural evidence in the record strengthens this presumption. First, a low price elasticity of demand strengthens that inference,[271] and the record evidence establishes that the price elasticity of demand for VCM is low. Second, VCM is a highly homogeneous product, with few if any differences from one firm to another. Third, cost functions for producing VCM are relatively similar from one firm to another. Fourth, the number and size of VCM buyers are not likely to constrain the pricing discretion of VCM producers. Fifth, the frequency, size and public character of VCM transactions are not likely to complicate collusive efforts. Sixth, demand and supply conditions in the VCM market are likely to remain relatively stable over the next few years. Seventh, vertical integration between VCM and PVC producers facilitates efforts to collude in the VCM market.

The foregoing structural factors strengthen the presumption that the acquisition is likely to have anticompetitive effects in the VCM market. The generalized and self-serving testimony of industry members that the industry is competitive does not rebut the strong evidence that the acquisition is likely to have anticompetitive effects. The attached order will remedy the anticompetitive effects of the acquisition by requiring Goodrich to divest the VCM plant it acquired from Diamond.

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[269] *E.g.*, *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1163-64 (9th Cir. 1984); *Marathon Oil Corp. v. Mobil Corp.*, 669 F.2d 378, 380-81 (6th Cir. 1981); *see Weyerhaeuser Co.*, 106 FTC at 287.

[270] *E.g.*, *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963) (increased C_4 to 78 percent); *United States v. Waste Management, Inc.*, 743 F.2d 976, 981 (increased C_4 to 67.1 percent); *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1163 (9th Cir. 1984) (increased C_4 to 75 percent); *Weyerhaeuser Co.*, 106 FTC at 279 (increased C_4 to 57.8 percent); *Grand Union Co.*, 102 FTC at 1056-58 (increased C_4 in thirteen markets to levels ranging from 49 percent to 72 percent) (*dictum*).

[271] *Marathon Oil Corp. v. Mobil Corp.*, 669 F.2d at 381.

STATEMENT OF CHAIRMAN DANIEL OLIVER CONCURRING IN PART AND DISSENTING IN PART

I. INTRODUCTION

I concur with the majority in its determination that "the acquisition is not likely to have anticompetitive effects in the PVC market." Although PVC appears to define a relevant antitrust market, a PVC conspiracy is unlikely because, *inter alia*, the PVC market is relatively unconcentrated, PVC is heterogeneous, production cost functions vary from one PVC producer to another, and successful monitoring would necessarily extend to the market for PVC products. Moreover, the acquisition does nothing that would substantially increase the likelihood of a PVC conspiracy.[1] However, I disagree with the majority's conclusion that the Goodrich acquisition may substantially lessen competition by creating an appreciably increased danger of collusion in the VCM market, and would affirm the Administrative Law Judge's order dismissing the case.

The VCM and PVC markets are closely related. PVC can be produced only from VCM, and almost all VCM is used to produce [2] PVC. VCM produced and used by integrated firms is internally produced, internally shipped (often by pipeline) and internally priced. Because some VCM producers are integrated downstream into PVC production and others are not, there are basically three different groups that would be directly affected by collusion in either of these markets. First, there are the integrated VCM/PVC producers.[2] Approximately one half of VCM and PVC production comes from this group. Second, some firms produce only VCM for sale (nonintegrated VCM producers).[3] Third, there are nonintegrated PVC producers that must have a supply of VCM in order to operate.[4]

Tacit collusion in the VCM market would be difficult to achieve or maintain for several reasons. First, the incentives of the two groups of VCM producers in that market, integrated and nonintegrated firms differ materially, despite the majority's assumptions to the contrary.[5] The integrated VCM/PVC producers have a common interest in undercutting the PVC sales of the nonintegrated PVC producers which, if successful, would also erode any cartel price tacitly agreed on by the nonintegrated VCM [3] producers. Second, collusion is only possible where price or output restrictions can be effectively monitored. For a VCM conspiracy to be successful in this case, all participants would have to be assured that the others were not cheating on the cartel price. However, the quantity of VCM produced and used by integrated firms cannot be directly observed by other firms. Levels of VCM output from integrated firms may only be monitored indirectly, from the sales of PVC resins and other PVC end products that the integrated firms market. But many of the same factors that make collusion difficult in the PVC market are also present in the VCM market, making the efforts of the nonintegrated VCM producers to monitor the integrated VCM PVC/VCM producers in their sales of PVC sufficiently difficult to defeat an attempt to cartelize the VCM market.

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[1] When there is no threat of single firm market power, the controlling question is "whether the challenged acquisition is likely to hurt consumers by making it easier for the firms in the market to collude, expressly or tacitly, and therefore force prices above or further above the competitive level." *Hospital Corporation of America*, 106 FTC 361, 464 (1985), *aff'd* 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, __ U.S. __, 107 S.Ct. 1975, (1987).

[2] After the acquisition, these included Goodrich, Formosa, Georgia Pacific, Borden and Conoco.

[3] This group included Dow, Shell, and PPG after the acquisition at issue here.

[4] There were eight principal firms in this category after the acquisition: Air Products, CertainTeed, Keysor-Century, Occidental, Pantasote, Shintech, GenCorp, and Tenneco.

[5] See Majority Opinion at 94-96, 103-104.

In evaluating whether a merger may substantially lessen competition, we necessarily attempt to make a prediction of the potential for certain future conduct. We need not achieve complete certainty in this predictive process, but unless we have a plausible theory and credible evidence explaining why a merger is likely to increase substantially the risk of collusion (or the degree of effective collusion) we have no basis under Section 7 of the Clayton Act to find the merger illegal. Lacking any theory or evidence apart from somewhat increased levels of concentration, we have no basis for reversing the ALJ's holding [4] that the acquisition is not likely to substantially lessen competition.

II. INCENTIVES OF INTEGRATED AND NONINTEGRATED FIRMS TO COLLUDE

The majority opinion concedes that an effective collusive strategy to obtain supracompetitive prices in the VCM market would require the participation of both the integrated VCM/PVC producers and the nonintegrated VCM producers.[6] The majority recognizes, however, that the nonintegrated VCM firms are at a disadvantage in reaching and enforcing tacit collusion because they cannot directly monitor the output or price of VCM that is internally consumed by the integrated VCM/PVC producers.[7] As a result, the majority opinion suggests that the nonintegrated VCM producers "can rely on the integrated firms as a group to monitor their integrated competitors."[8] In effect, then, the majority posits dual cartels, one among the nonintegrated VCM firms and another with the integrated VCM/PVC firms monitoring the PVC **[5]** sales of one another, reaching overall agreement on VCM prices and output. Because of the adverse effect a collusive agreement would be likely to have on the nonintegrated PVC producers, however, the integrated VCM/PVC producers would have a significant incentive to undercut any collusive efforts.[9]

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[6] Majority Opinion at 94.

[7] *See* Majority Opinion at 99.

[8] Majority Opinion at 99. In effect, the collusive effort proposed by the majority would include agreement on open market sales among all VCM producers and a separate collusive agreement among the integrated VCM/PVC producers at the PVC level. For the whole scheme to work this latter agreement would have to consist of agreed upon prices and output levels of PVC that incorporated the cartel's "market" price for VCM.

As the majority recognizes, to remain in the market the nonintegrated PVC firms would have to accept increases in the price of VCM imposed by the cartel. Because VCM is used in a fixed proportion with other inputs to produce PVC, and there is no commercially available substitute for VCM, nonintegrated PVC producers could not shift to another input. They would be forced to pay any supracompetitive price for VCM.[10] Since the demand **[6]** for PVC is relatively inelastic, the nonintegrated PVC producers would probably be able to pass along much of the price increase. Unless they were able to pass along all of the price increase, however, their profit margins would necessarily decline, as would their sales volume.[11]

The nonintegrated PVC producers compete, of course, with the integrated VCM/PVC producers. Because the integrated VCM/PVC producers need not charge themselves the same VCM prices that would be forced on the nonintegrated PVC producers, they have the ability to undersell the nonintegrated PVC producers.[12] If the price of VCM rose, integrated VCM/PVC firms would have an incentive to raise PVC prices, but by a smaller amount than the nonintegrated PVC producers would have to charge to take account of the higher cartel price of VCM. In this way, integrated **[7]** producers could enjoy both increased profits per unit and increased market share.

Integrated producers would face such incentives until the conspiracy failed, with nonintegrated PVC producers, squeezed by higher VCM costs and price competition in the PVC market, reducing VCM purchases and PVC sales or exiting the industry. A decrease in the market share of nonintegrated PVC firms would ultimately reduce the market of the nonintegrated VCM firms. As a result, the nonintegrated VCM firms only have an incentive to increase the price of VCM if they can be assured that the integrated VCM/PVC producers will not undersell the nonintegrated PVC producers. Unless there are strong assurances that this will be the case, nonintegrated VCM firms will not undertake a collusive strategy that results in eroding their own market share.

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[9] Another point where the incentives of the VCM producers vary is in the situation where VCM producers are integrated further upstream into production of chlorine (and caustic soda). Other VCM firms have long term contracts to purchase chlorine at a fixed price.

VCM is produced from ethylene, a petroleum product, and chlorine. Chlorine is itself produced by applying an electrical current to brine, yielding 1.1 pound of caustic soda for every pound of chlorine. When there is a large demand and high price for caustic soda, as there was in 1980, excess chlorine is produced. As a result, chlorine costs for this group of integrated firms (e.g. PPG and Dow) will vary with the demand for caustic soda. *See, e.g.*, RX 57230 (Diamond Shamrock's cost for chlorine estimated to be a negative .1 cents per pound). Chlorine cannot be easily stored, and when excess chlorine is produced there is a strong incentive to use it in VCM production.

VCM production costs may therefore differ significantly between firms that purchase chlorine at prices set in long term contracts and integrated firms subject to fluctuations in chlorine production and chlorine prices. This factor increases the difficulty of colluding on VCM prices and output.

[10] Of course cartels in both the VCM and PVC markets are extremely unlikely to arise, because an entity controlling one stage of a multi-stage production process will earn the largest profit when the other stages perform competitively. *See, e.g.*, R. Posner and F. Easterbrook, *Antitrust Cases, Economic Notes and Other Materials* 803–07, 875–86 (2d ed. 1981).

[11] In the hypothetical case in which the demand for PVC was perfectly inelastic, PVC producers could pass on all of the price increase and would not experience a decline in their sales volume. The majority does not suggest that this hypothetical case exists in the real world.

[12] The integrated VCM/PVC firms also enjoy an advantage over a VCM cartel because they can vary the prices of the different grades of PVC that they sell. The nonintegrated VCM firms, by contrast, must sell all of their VCM at the supracompetitive price, and the nonintegrated PVC firms will have to pay for, and pass along, an increased price for all grades of PVC that they produce.

III. ABILITY OF NONINTEGRATED VCM FIRMS TO MONITOR INTEGRATED FIRMS

In order for a collusive strategy to succeed, VCM producers would not only have to develop a consensus on price and output levels,[13] they must also be able to enforce that tacit agreement. [8] The necessary prerequisite for any retaliatory conduct is the ability to monitor the conduct of competitors and detect cheating on the cartel. The task of monitoring a collusive arrangement in the VCM market would be extremely difficult, and would fail for many of the same reasons the majority concludes that collusion in the PVC market is unlikely in this case.[14] In order to be successful, a VCM cartel would be required to observe the actions of the integrated VCM/PVC producers at three stages of the production process: first, open market sales of VCM; second, sales of PVC; and third, sales of products fabricated from PVC by those firms integrated further downstream into that stage.

Perhaps the easiest task of monitoring involves open market sales of VCM. If a consensus price could be established, nonintegrated VCM firms would be able to detect cheating by integrated firms selling to nonintegrated PVC producers at less than the cartel price. The opposite is also true, however. Integrated firms would be able to determine the market price [9] being charged to nonintegrated PVC producers. To the extent that integrated firms can obtain some of these sales, they can obtain the benefits of the supracompetitive pricing being charged to the nonintegrated PVC producers. Similarly, knowing the market price for VCM, they are in a better position to undercut the price that the nonintegrated PVC firms ultimately charge.

As the majority recognizes, the nonintegrated firms are at a relative disadvantage in monitoring the integrated VCM/PVC producers. Because most of the VCM produced by the integrated firms is not sold on the market but consumed internally,[15] the only recourse of the nonintegrated VCM producers is to attempt to determine whether the integrated VCM/PVC firms are including the consensus VCM price in their PVC prices and producing the appropriate amount of PVC.

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[13] The majority suggests that the integrated VCM/PVC producers would "passively welcome collusion in the [VCM] market—in the sense that they will profit from declining to increase VCM production in response to higher VCM prices. . . ." Majority Opinion at 96. They might profit even more by increasing their output, a step they are quite likely to take if that output cannot be readily observed.

[14] This presumes that a collusive strategy would be successful in raising prices in the first place. As the majority points out, pp. 85–89, the sales arrangements among the firms in the VCM and PVC market make them very sensitive to price fluctuations. If a group of firms attempted to create a cartel price for VCM, these efforts would be detected very quickly. Even if successful, however, the integrated VCM/PVC firms would still have an incentive to undercut the cartel price in their PVC sales.

This task is likely to be quite difficult for the nonintegrated VCM producers to accomplish. First, there are a large number of purchasers of PVC resin that must be monitored.[16] Moreover, many PVC costs and outputs must be monitored. There are different grades of PVC and different quality levels within **[10]** grades. In addition, individual plant operating costs and transportation costs vary. Thus the opportunities for the integrated firms to cheat are very great.[17]

The majority suggests that the nonintegrated VCM producers can use the nonintegrated PVC producers to assist in their efforts to monitor the PVC sales of the integrated VCM/PVC firms. However, if the nonintegrated PVC producers learn that they are being undersold, they would be likely to report that fact to the nonintegrated VCM producers. The nonintegrated PVC producers' only alternative to losing market share would be to demand lower prices from the VCM producers, which, if successful, would itself defeat the cartel.[18]

The final stage at which monitoring would be necessary in order to detect cheating on the cartel is in fabrication of products from PVC resins. Four of the five integrated VCM/PVC producers are vertically integrated further downstream into **[11]** fabrication of products from PVC.[19] As long as these integrated firms have the capability of substantially increasing their output of PVC fabricated products, successful implicit collusion in the VCM market would have to include agreement on the optimal amount of PVC to be produced, as well as the output and pricing of PVC fabricated products and concomitant monitoring. Unless the nonintegrated VCM producers are able to monitor price cutting by integrated firms at that stage, there is a significant opportunity for the integrated VCM/PVC firms to expand production of those end products and increase market share at the expense of the nonintegrated PVC producers. This is likely to be very difficult to monitor.

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[15] The use of pipelines contributes to the difficulty of determining directly the amount of VCM produced by the integrated VCM/PVC firms.

[16] A 1979 Goodrich study indicated that 300 PVC resin buyers accounted for 80% of the market. CX 53J-K.

[17] Even if the integrated firms can determine that other integrated firms are cheating (which may be quite difficult), it is still to their advantage to do so if the nonintegrated firms do not also learn this fact.

[18] The nonintegrated PVC producers have an incentive to seek lower prices in order to maintain or increase their competitive position in any event, and might well claim that they are being undersold even if they are not.

[19] Goodrich estimated that Borden utilized 39% of its PVC capacity internally. RX 200D. Borden's internal use of PVC consisted primarily of the production of PVC film for meat and produce packaging and pallet stretch wrap. Approximately 29% of Borden's 1982 PVC capacity was devoted to this use. The remaining 10% of captive PVC production was utilized in the production of coated fabrics. RX 200E.

Goodrich's own captive PVC production was used to make pipe, windows, packaging, siding, wire and cable. In 1981 Goodrich had 46.6% of the siding market, 15.6% of the pipe market, 16.5% of the window market, 3.4% of the packaging market, and 30.0% of the wire and cable market.

Formosa's captive production of PVC is used to make pipe, film, and sheet. RX 247A.

As a result, tacit collusion among all VCM producers would fail unless it is possible to monitor not only all open market sales of VCM to nonintegrated PVC producers, but also the PVC output of the integrated VCM/PVC producers, as well as their production of materials fabricated from PVC. The same factors [12] that lead the majority to conclude that collusion is not a threat at the PVC level lead me to conclude that collusion at the VCM level is also not feasible.

IV. CONCLUSION

Unlike the majority, I believe that the vertical integration present in the VCM and PVC markets makes collusion on VCM extremely difficult, if not impossible. Not only do the integrated VCM/PVC producers have strong incentives to jointly undercut any cartel price for VCM, the process of detecting any cheating would be so complicated that it would not be likely to succeed. I would affirm the ALJ and dismiss the complaint.

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA, WITH WHOM COMMISSIONER PATRICIA P. BAILEY JOINS, CONCURRING IN PART AND DISSENTING IN PART

I concur in the opinion of the majority insofar as it finds that the acquisition by B.F. Goodrich of Diamond Shamrock Plastics Corporation from Diamond Shamrock Chemicals Company may substantially lessen competition in the market for vinyl chloride monomer ("VCM") in violation of Section 7 of the Clayton Act. Unlike the majority, I would also find liability in the market for polyvinyl chloride ("PVC"). I disagree with the presumptions based on concentration data that the majority employs and with their analysis of competitive conditions in the market for PVC.

As the majority recognizes, the level of and increase in concentration resulting from this acquisition in both the VCM and PVC markets create a rebuttable presumption of anticompetitive effects. The Department of Justice 1984 Merger Guidelines divide the range of concentration as measured by the Herfindahl-Hirschman Index ("HHI") into three tiers: unconcentrated, moderately concentrated and highly concentrated. Goodrich's acquisition increased the HHI by 221 points to 1131[1] in the PVC [2] market and by 304 points to 1663 in the VCM market.[2] Both markets fall within the moderately concentrated range (post-acquisition HHI between 1000 and 1800), in which the Department has said it is more likely than not to challenge acquisitions that increase the HHI by 100 points or more. When an acquisition falls in this middle range, the Guidelines anticipate a careful review of competitive conditions, and the Commission has said that an "especially careful review of a number of industry characteristics in addition to concentration" is needed to assess the likely competitive effects of the transaction. *Weyerhaeuser Co.*, 106 FTC 172, 280 (1985).[3]

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[1] I.D.F. 53 *in camera;* slip op. at 54 (based on actual production). These figures correctly attribute all of Diamond Shamrock's Deer Park PVC plants to Goodrich, because the sale of Deer Park #5 to Goodrich precluded the sale
(footnote cont'd)

Having established that the concentration in each market falls within the middle tier, the majority then subdivides that tier and assigns to each segment a different presumption of liability before proceeding to an analysis of other competitive conditions. Although both markets are moderately concentrated, the majority concludes that because the PVC market is moderately concentrated "only by the barest of margins," the presumption of anticompetitive effects in that market is "even weaker." Slip op. at 57–58. The slightly higher numbers in the VCM market create a "relatively strong presumption of anticompetitive effects," according to the majority, which can be rebutted only [3] by "relatively strong evidence from other factors." Slip op. at 63. This emphasis by the majority on relatively minor differences in concentration statistics suggests that the numbers have a scientific predictive value that does not exist.

The Commission often has qualified the significance of concentration data as a predictor of market power, *e.g.*, FTC Statement Concerning Horizontal Mergers, 2 Trade Reg. Rep. (CCH) ¶ 4516, at 6901–3 (June 14, 1982) ("FTC Statement"), and the Merger Guidelines also make clear that "the numerical divisions suggest greater precision than is possible with the available economic tools and information." Section 3.1. We use market share data in a Section 7 case "as an important preliminary surrogate measure of market power," FTC Statement at 6901–3, but statistics "provide only the starting point for analyzing the competitive impact of a merger." Merger Guidelines § 3.11. Because of the limited predictive power of market share and concentration data, a careful evaluation of other indicators of market power usually is necessary.

Although the Commission has said that "more persuasive" evidence will be needed to rebut a *prima facie* case when a market is highly concentrated than when the market is moderately concentrat-

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of the other Deer Park plants to another firm and Diamond agreed, until the plants were closed, to operate them for Goodrich. I.D.F. 10–14; slip op. at 7–10 & n.12. Goodrich perceived the arrangement as "the only option that keeps Diamond from being a disruptive force in the market place." *Id.* at 10.

[2] I.D.F. 262; slip op. at 61 (based on actual production).

[3] In *Weyerhaeuser*, the challenged acquisition increased the HHI by 211 points to 1166, "within the lower end of the mid-range of the Department of Justice Merger Guidelines." 106 FTC at 280.

ed, *Grand Union Co.*, 102 FTC 812, 1055 (1983) (dicta),[4] I know of no authority to support the majority's differing presumptions when concentration data in two separate **[4]** markets, both of which are moderately concentrated, are similar to the two before us. The Merger Guidelines do not establish a different standard of review for mergers with different market share data, except to suggest, as the Commission did in *Grand Union*, that the presumption of anticompetitive effects based on statistics will be difficult to rebut when the market is highly concentrated.[5]

The majority's presumptions add nothing to merger analysis in terms of predictability or ease of application. The majority infers that in the *Weyerhaeuser* case, the Commission decided that the concentration data created only a weak presumption of anticompetitive effects, and the majority suggests that non-statistical evidence to rebut the presumption of illegality in the PVC market "need not be as strong as it was in *Weyerhaeuser.*" Slip op. at 58. In *Weyerhaeuser*, the Commission dismissed the complaint based on an evaluation of several market characteristics including, in particular, ease of entry. I see no easy or useful way to compare the weight of evidence in *Weyerhaeuser* concerning industry characteristics such as ease of entry in the west coast market for corrugating medium (a paper product) with the weight of the non-statistical evidence concerning the PVC market, in which the majority finds **[5]** substantial barriers and impediments to entry. Slip op. at 31. Simply to attempt such a comparison between highly fact-specific cases would complicate merger analysis even further without any apparent off-setting benefits.

The terms used by the majority may well raise more questions than they put to rest. Is the presumption of liability in the market for VCM "relatively strong" only as compared to the "even weaker" presumption in the PVC market? In the context of the Herfindahl-Hirschman Index, does "relatively strong" mean "slightly weak," "somewhat strong," "quite strong" or plain old everyday "average?" How does the "relatively strong" presumption for VCM compare to the presumption that applies when the HHI rises 100 points and exceeds 1800? It might be possible to work through this exercise, but further attempts to refine the presumptions stemming from concentration figures are unlikely to be useful until those figures can be shown to correspond more precisely to market power. The temptation to seek comfort from the apparent certainty of numbers is understandable, but we should be wary of false comforts.

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[4] In *Grand Union Co.*, the Commission found no Section 7 violation "for reasons other than the level of concentration and . . . market share." 102 FTC at 1056.

[5] Merger Guidelines § 3.11(c). The Commission has said that the value of non-market share evidence will be high when it consistently points in the same direction, particularly when the market shares are in the low and moderate ranges, and that nonmarket share factors may be given less weight when concentration is high. FTC Statement at 6901-4.

In addition to finding that the PVC and VCM markets are moderately concentrated, the majority finds "substantial barriers and impediments to entry" in both markets and finds that "fringe firms are unlikely to constrain collusive conduct" in either market. Slip op. at 31. The only significant difference between the two markets for the purpose of merger analysis is the number of customers. PVC purchasers number in the hundreds, I.D.F. 216; [6] the only purchasers of 96% of VCM consumed in the United States are the small number of firms that produce PVC. I.D.F. 289. These facts suggest that collusion would be easier in the PVC market than in the VCM market, if, as the majority correctly assumes, slip op. at 84–85, collusion is easier for sellers in markets with a large number of buyers.

The majority nevertheless identifies three reasons (in addition to lower concentration) for concluding that there is no violation in the market for PVC. First, PVC is said to be "relatively heterogeneous." Second, the majority finds that costs "vary significantly" among PVC producers. Finally, although the price elasticity of PVC is "relatively low," the majority concludes that the ability of PVC producers to raise prices "may be constrained to some degree by the higher price elasticity of demand" for PVC end products. Slip op. at 113. None of these conclusions is supported by the record. In fact, PVC is a homogeneous product, the costs of producing PVC do not vary significantly among firms and the elasticity of demand for PVC is low and unlikely to constrain collusion.

We are charged with responsibility for making predictive judgments under Section 7 on the basis of all the relevant facts.[6] The fact-specific analysis of the two markets at issue here discloses no material differences between them and shows [7] that anticompetitive effects are likely in each. Indeed, unless one accepts the majority's differing presumptions based on market share and concentration data, the case for liability in the PVC market is at least as strong as the case for liability in the VCM market.[7]

1. Homogeneity of PVC

The majority concludes that PVC is "considerably more heterogeneous" (compared, presumably, to VCM), because it is produced in three grades and because producers face differing transportation costs. Slip op. at 65–66. This heterogeneity, according to the majority, is one of the reasons collusion is unlikely in the PVC market. I disagree. On this record, the PVC market is not one in which product differentiation is important.

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[6] "[C]onsiderations [other than concentration statistics] often do not lend themselves to precise mathematical expression, but they can be more important than quantitative measures of concentration." Echlin Manufacturing Co., 105 FTC 410, 483–84 (1985).

[7] If this were an exercise in prosecutorial discretion, the practical effect of the majority's decision in the PVC market would be to raise the dividing line identified in the Merger Guidelines between unconcentrated and moderately concentrated markets.

In terms of its physical characteristics, PVC is boringly homogeneous. PVC is classified in three general, differently priced categories—pipe, general purpose and specialty PVC. Pipe grade PVC historically has been the lowest priced of the three grades. General purpose PVC sells at a small premium over pipe resin, and specialty resin usually commands a small premium over general purpose PVC.[8] More than 75% of bulk and suspension PVC is considered by industry members to be a "commodity" [8] product, with no significant quality differences among producers. I.D.F. 87 & 90. Although there may be some quality differences among specialty resins produced by different firms, industry witnesses testified that any producer could deliver an acceptable substitute specialty resin.[9]

Industry witnesses also testified that buyers of commodity grade PVC will switch suppliers over small differences in price, I.D.F. 87 & 90; R.A.B. at 36, and that no specialty resin supplier can command a price higher than that of competing suppliers of the same grade. I.D.F. 88. The willingness to switch suppliers over small price differences and the inability of any supplier to obtain a price premium tend to confirm that PVC is homogeneous within grades.[10] Buyers would be unwilling to switch suppliers to gain small price advantages if there were other important differences in the PVC produced by different firms, and firms could command price premiums if they offered a unique product.[11] The record shows that the physical qualities [9] of PVC place it at the homogeneous end of the product spectrum and do not impair the ability of PVC firms to collude.[12]

The majority also treats the cost of transporting PVC as an aspect of heterogeneity and concludes that transportation cost differences among PVC firms are likely to complicate collusion. Slip op. at 68 & 80. To support its conclusion, the majority simply recites the fact that PVC plants are situated in various locations around the country. Slip op. at 68–69.[13] This information, however, tells us nothing, because the record does not show the locations of the PVC customers served by the PVC plants. In fact, the record is largely silent as to the cost of shipping PVC to customers. In more than 5000 pages of testimony, one witness testified that "freight and other things" could provide "small differences in pricing,"[14] and the respondents' economic expert asserted, without citing any supporting material, that locational differences were "likely to affect" the cost of serving customers.[15] **[10]**

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[8] H. Wheeler 1750–51; DiLiddo 3268; Schaefer 1076; R.A.B. at 36.

[9] Schaefer 1076; Becker 1331–33.

[10] DiLiddo 3372; Disch 707–09; Schaefer 1200–02; McMath 1951. These witnesses testified that PVC buyers will change suppliers for price differences as low as one-quarter and one-half cent per pound.

[11] The respondents' economic expert testified that the physical heterogeneity of PVC was "not severe," as evidenced bv the lack of systematic price discrimination. Klass 5363.

[12] *See* United States v. Container Corp., 393 U.S. 333, 336 (1969) ("While containers vary as to dimensions, weight, color, and so on, they are substantially identical, no matter who produces them, when made to particular specifications."); FTC v. Bass Brothers Enterprises, Inc., 1984–1 Trade Cas. (CCH) ¶ 66,041, at 68,612 (N.D. Ohio 1984) ("Carbon black is a homogeneous, fungible product. Although it is produced in numerous different grades . . . in fact nearly all of the producers produce basically the same grades and types.").

[13] The majority also cites RX 1168, slip op. at 69 n.152, but this document is based on RX 245 and does not show the actual costs of firms. *See* notes 19 & 21 *infra* & accompanying text.

Even if the cost of shipping PVC to customers differs among firms, any differences are unlikely to be sufficient to diminish the likelihood of collusion in the industry. If transportation cost differences were significant, we would expect to see a series of regional markets. Instead, the record shows that the market is national,[16] that PVC producers sell in the national market on the basis of delivered price and that price differences among suppliers are as small as one-quarter to one-half cent per pound. These facts suggest that transportation costs do not cause substantial cost differences among firms that would complicate collusion.

2. Costs of Producing PVC

The majority concludes that the costs of producing PVC vary significantly among firms, making collusion more complicated and, therefore, less likely. The differing costs identified by the majority are the costs of operating reactors of different sizes and the costs of transporting PVC to customers. Slip op. at 77–78. As discussed in the section above, differences in the cost of transporting PVC, which are also treated by the majority as an aspect of heterogeneity, are insignificant. Although operating costs may vary among firms, the record also does not support the majority's conclusion that the differences are significant. **[11]**

PVC reactors of different sizes have different production costs, but, as the majority recognizes, production costs do not vary within grade but "from one PVC resin grade to another." Slip op. at 79. Commodity PVC, which accounts for about 75% of industry sales, is produced in large reactors. Industry witnesses testified that the costs of producing PVC in large reactors are similar among firms. *See* slip op. at 78–79. Smaller reactors operate at a cost disadvantage when compared to large reactors, but smaller reactors produce specialty PVC resins, which occupy a special niche in the market and enjoy a price premium over commodity PVC resins. Indeed, one of Diamond Shamrock's goals in the PVC market was to occupy the higher priced specialty market niches,[17] and Diamond Shamrock's position in the specialty resin market was an attribute that made the acquisition attractive to B.F. Goodrich.[18] The cost differences related to different size reactors are likely to be significant, but those cost differences are unlikely to frustrate collusion when firms face similar costs for the same grades of PVC.

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[14] H. Wheeler 1749; *see also* Weber 1800.

[15] Klass 4311.

[16] The parties stipulated that the appropriate market is national, and the majority found that a national market "is consistent with the record evidence." Slip op. at 15.

To show that PVC firms face significantly different operating costs, the majority cites RX 1168A-B, *in camera*. This exhibit is based on a "cost study" prepared by a Goodrich employee, who estimated the costs of other firms but did not have **[12]** access to actual cost data from any firm except Goodrich itself.[19] Not surprisingly, the study shows a range of operating costs for PVC plants that is virtually identical to the range of actual costs at Goodrich's PVC plants. The range of costs shown for competing firms (and cited by the majority) is 14.30 cents per pound to 21.94 cents per pound. The same document shows that Goodrich's operating costs for its PVC plants ranged from 14.30 cents to 21.53 cents per pound.[20] This document at best supports a conclusion that there may be substantial intra-firm cost variations, but it tells us nothing about cost differences among firms or their impact on competition.[21]

The record shows that PVC producers consistently agree to meet the lower prices of their competitors, which a firm presumably would not do if it suffered a persistent and significant cost disadvantage. On this record, I conclude that although the costs of producing PVC may differ among firms, the **[13]** differences are not significant and are not likely to make collusion difficult.[22] As the majority observes in discussing the costs of producing VCM, "[a]lthough respondents have identified some minor differences [among firms], absolute congruence is not needed to heighten the likelihood of" collusion. Slip op. at 83.

3. Price Elasticity of Demand for PVC

The majority also concludes that "although the price elasticity of demand for PVC is . . . relatively low," attempts to collude on the price of PVC may be constrained by the elasticity of demand for end products manufactured from PVC. Slip op. at 113.[23] The record, however, shows not only that the elasticity of demand for PVC is low, but also that the price of PVC could be raised above competitive levels without causing the purchasers of end products to switch to other products. Industry witnesses testified that changes in PVC prices do not affect the [14] demand for products made from PVC.[24] For example, a 1983 B.F. Goodrich study, quoted by the majority, slip op. at 74–75, stated:

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[17] Becker 1327-28; Weber 1794-96; Arp 3519.

[18] DiLiddo 3205-06, 3209, 3211-13 *in camera*; *see* slip op. at 8-10.

[19] RX 245 *in camera*, which contains neither calculations nor method of calculation, was based on unspecified information from "public sources" and an employee's "best estimates" from those sources. DiLiddo 3225. RX 1168A-B, cited by the majority to show different PVC production costs, slip op. at 80 n.179, is based on and has the same deficiencies as RX 245.

[20] This difference of 7.64 cents apparently reflects the difference between operating large reactors in which commodity resins are produced and operating smaller reactors in which specialty resins are produced. *See* slip op. at 79 n.177.

[21] Even the respondents' economic expert testified that the numbers provided on RX 245 *in camera* should not be viewed as "hard numbers." Klass 5323.

[22] Nor do differing degrees of vertical integration suggest different production costs. In discussing PVC production costs, the respondents' economic expert said that if costs for integrated firms were clearly lower, then nonintegrated firms would not be able to survive. He concluded that the data in the record "clearly indicate that there is not such a uniform advantage." Klass 5337-38.

> PVC pipe manufacturers appear to have plenty of room for price increases before approaching the price levels of most competing materials. (Even if the prices were identical, PVC would still have the added advantage of lower installed cost.)

CX 247A, *in camera*.

At some point, it is no doubt true that an increase in the price of PVC would cause some consumers to substitute cheaper products for products made from PVC, but the record suggests there is ample room before that point is reached for a successful agreement to raise prices above competitive levels.

4. Vertical Integration

The respondents maintain that the different degrees of vertical integration among PVC firms and among VCM firms would make collusion more difficult in either market.[25] Aspects of vertical integration, like other aspects of market structure, may indeed affect the ease of reaching or enforcing a collusive [15] agreement. *See* R. Posner, *Antitrust Law* 60 (1976); F. Scherer, *Industrial Market Structure and Economic Performance* 204–05 (2d ed. 1980). The respondents, however, have not gone appreciably beyond general assertions of theory to show why in this case, where other relevant facts consistently point to the ease of collusion in both the PVC and VCM markets, vertical integration nevertheless makes collusion unlikely.

I find confusing the majority's lengthy response to the respondents' vertical integration argument, which gives the argument more credit than is due.[26] I do agree, however, with the majority's conclusion that both integrated and nonintegrated producers of VCM have strong incentives to collude and could readily detect cheating from a collusive agreement. If, as the majority concludes, PVC firms could accept and pass on to their customers a collusive VCM price increase, slip op. at 111, it must also be true that they could pass on a collusive PVC price increase.[27] The majority opinion therefore suggests, and I agree, that vertical integration does not deter the ability of PVC firms to collude. **[16]**

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[23] This conclusion is inconsistent with the majority's statements that "the price elasticity of demand for most PVC end products is relatively low," slip op. at 75, and that "the demand for PVC is sufficiently inelastic to make it likely that an increase in VCM prices can profitably be passed along to PVC customers." Slip op. at 111. If PVC producers can pass on a cost increase (such as a VCM price increase), then presumably they could also profitably pass on a collusive PVC price increase.

[24] Schaefer 1141; Disch 664–80; Becker 1325–36; H. Wheeler 1753–54; Weber 1811–12, 1828. The majority is correct in rejecting the assertion of the respondent's expert witness that PVC is price elastic. Slip op. at 75 n.168.

[25] The respondents argue that differing degrees of vertical integration increase the number of areas with respect to which a consensus would have to be reached, complicate price and output monitoring and contribute to an environment of differing goals, incentives, costs and profit opportunities among firms. R.A.B. at 40 & 69.

[26] We are concerned in this case with horizontal market power, the ability to raise price above competitive levels. Vertical integration does not affect horizontal market power, which can be exercised in either or both of the vertically related markets. *See, e.g.*, R. Bork, "Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception," 22 U. Chi. L. Rev. 157, 195–98 (1954).

An analysis of the record shows conditions that are conducive to collusion in the PVC market and in the VCM market. Although we can speculate on the extent to which the interests of integrated and nonintegrated firms might complicate collusion, the record shows nothing about differing incentives or other differences stemming from vertical integration that suggests that collusion would be unlikely in either market.

With respect to the market for PVC, I dissent.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of complaint counsel from the initial decision and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying opinion, the Commission has determined to deny the appeal in part and to grant the appeal in part. Accordingly, **[2]**

It is ordered, That the findings of fact and initial decision of the Administrative Law Judge be adopted insofar as not inconsistent with the findings of fact and conclusions contained in the accompanying opinion.

It is further ordered, That the following order be and the same hereby is entered:

I.

Definitions

It is ordered, That for purposes of this order the following definitions shall apply:

A. *"Goodrich"* means The B.F. Goodrich Company, a corporation organized under the laws of New York with its principal place of business in Akron, Ohio, and its directors, officers, agents, and employees, and its subsidiaries, divisions, affiliates, successors, and assigns.

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[27] *See* R. Bork, *supra* note 26, at 196 n.128; F. Warren-Boulton, *Vertical Control of Markets* 51-55 (1978).

B. *"Diamond Shamrock"* means Diamond Shamrock Chemicals Company, a corporation organized under the laws of Delaware with its principal place of business in Dallas, Texas, and its directors, officers, agents, employees, subsidiaries, divisions, affiliates, successors, and assigns.

C. *"La Porte VCM Plant"* means the VCM manufacturing facility located at La Porte, Texas, and all assets, titles, properties, interests, rights and privileges, tangible and intangible, related to the VCM business, [3] that were acquired by Goodrich from Diamond Shamrock pursuant to the January 4, 1982, agreement between Goodrich and Diamond Shamrock, together with all improvements thereto.

D. *"VCM"* means vinyl chloride monomer, a gaseous, reactive, acyclic intermediate chemical, with chemical identity $CH_2=CHC1$, also called chloroethylene or monochloroethylene.

II.

It is ordered, That within twelve (12) months from the date this order becomes final, Goodrich shall divest, absolutely and in good faith, at no minimum price, the La Porte VCM Plant. The purpose of the divestiture is to establish the La Porte VCM Plant as a viable competitor in VCM, by insuring its continuation as an ongoing, viable enterprise in the VCM industry; and to remedy the lessening of competition resulting from the acquisition of the La Porte VCM Plant by Goodrich. The divestiture shall be made only to an acquirer or acquirers, and only in a manner, that receives the prior approval of the Federal Trade Commission.

Pending divestiture, Goodrich shall take all measures necessary to maintain the La Porte VCM Plant in its present condition and to prevent any deterioration, except for normal wear and tear, of any part of the La Porte VCM Plant, so as not to impair the La Porte VCM Plant's present operating viability or market value. [4]

III.

It is further ordered, That at the time of the divestiture required by this order, Goodrich shall provide to the acquirer of the La Porte VCM Plant, on a nonexclusive basis, all VCM technology (including patent licenses and know-how) used by Goodrich, or developed by Goodrich, for use in the La Porte VCM Plant; and

For a period of one (1) year following the divestiture required by this order, Goodrich shall provide the acquirer of the La Porte VCM Plant, if the acquirer so requests, such additional know-how as may reasonably be required to enable such acquirer to manufacture and sell VCM.

Goodrich shall charge the acquirer no more than its own costs for providing such additional know-how.

IV.

It is further ordered, That at the time of the divestiture required by this order, Goodrich shall assign to the acquirer of the La Porte VCM Plant all chlorine and ethylene feedstock supply agreements; all VCM supply, sales, toll, or exchange agreements; and all VCM customer records and files relating to VCM produced in (or supplied by Goodrich at any time since January 1, 1985 from) the La Porte VCM Plant.

V.

It is further ordered, That if Goodrich has not divested the La Porte VCM Plant within the twelve-month period provided in **[5]** paragraph II of this order, the Federal Trade Commission may appoint a trustee to effect the divestiture. The trustee shall be a person with experience and expertise in acquisitions and divestitures. Neither the appointment of a trustee nor a Commission decision not to appoint a trustee under this paragraph V of the order shall preclude the Commission from seeking civil penalties and other relief available to it, including a court-appointed trustee, for any failure by Goodrich to comply with this order.

Any trustee appointed by the Commission pursuant to this paragraph V shall have the following powers, authority, duties, and responsibilities:

A. The trustee shall have the exclusive power and authority, subject to the prior approval of the Commission, to divest the La Porte VCM Plant. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestiture. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission.

B. The trustee shall have full and complete access to the personnel, books, records and facilities of the La Porte VCM Plant, and Goodrich shall develop such financial or other information relevant to the La Porte VCM Plant as **[6]** the trustee may reasonably request. Goodrich and Diamond Shamrock shall cooperate with the trustee, and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Goodrich or Diamond Shamrock shall extend the time for divestiture under this paragraph V in an amount equal to the delay, as determined by the Commission.

C. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with this order's absolute and unconditional obligation to divest at no minimum price, and with the purposes of the divestiture as stated in paragraph II of this order, subject to the prior approval of the Commission.

D. The trustee shall serve, without bond or other security, at the cost and expense of Goodrich on such reasonable and customary terms and conditions as the Commission may set. The trustee shall have authority to retain, at the cost and expense of Goodrich, such consultants, attorneys, investment bankers, business brokers, accountants, appraisers, and other representatives and assistants as are reasonably necessary to assist in the divestiture. The trustee shall account for all monies derived from the divestiture and for all expenses incurred. After approval by the Commission of the **[7]** account of the trustee, including fees for his or her services, all remaining monies shall be paid to Goodrich, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting the La Porte VCM Plant.

E. Goodrich shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order, unless the Commission determines that such losses, claims, damages, or liabilities arose out of the misfeasance, gross negligence, or the willful or wanton acts or bad faith of the trustee.

F. Promptly upon appointment of the trustee and subject to the approval of the Federal Trade Commission, Goodrich shall, subject to the Federal Trade Commission's prior approval and consistent with provisions of this order, transfer to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

G. If the trustee ceases to act or fails to act diligently, the Commission may appoint a substitute trustee.

H. The Commission may on its own initiative or at the request of the trustee issue such **[8]** additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

I. The trustee shall have no obligation or authority to operate or maintain the La Porte VCM Plant.

J. The trustee shall report in writing to Goodrich and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

VI.

It is further ordered, That Diamond Shamrock shall take no action that may interfere with the divestiture required by this order and shall assert no right or claim, arising by contract or otherwise, against the stock or assets of the La Porte VCM Plant that may impair its operating abilities or market value; and

For a period of five (5) years from the date this order becomes final, Diamond Shamrock shall:

A. Provide to the La Porte VCM Plant all utilities, services, and feedstock supplies (including chlorine or ethylene) requested for operation of the La Porte VCM Plant, to the same extent and on the same terms and conditions that such utilities, services or feedstock supplies were supplied by Diamond Shamrock to Goodrich at any time after January 1, 1982; and

B. Make available to the La Porte VCM Plant without charge, for its use in connection with any purchase, toll, sale, or exchange incident [9] to the ordinary operation of a VCM plant all pipelines for transporting VCM, chlorine, or ethylene that are connected to the La Porte VCM Plant and that are owned by Diamond Shamrock.

VII.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, Goodrich shall not directly or indirectly acquire—other than the acquisition of manufactured product in the ordinary course of business—all or any part of the stock or assets of, or any interest in, any producer of VCM located in the United States without the prior approval of the Federal Trade Commission.

VIII.

It is further ordered, That Goodrich shall, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until it has fully complied with the provisions of paragraph II of this order, submit in writing to the Commission a report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with that provision. Such compliance reports shall include, among other things that may be required from time to time, a full description of all contacts and negotiations relating to the divestiture of the La Porte VCM Plant, including the name and address of all parties contacted, copies of all written communications to and from such parties, and all internal [10] memoranda, reports and recommendations concerning divestiture; and

Goodrich shall submit such further written reports of its compliance as the staff of the Commission may from time to time request in writing.

IX.

It is further ordered, That any reacquisition of all or any part of the La Porte VCM Plant by Diamond Shamrock from Goodrich shall be subject to the provisions of this order; and if Diamond Shamrock reacquires the La Porte VCM Plant, it shall:

A. For a period of three years following such reacquisition, maintain the marketability and viability of any such reacquired assets, consistent with paragraph II of this order; and

B. For a period of three years following such reacquisition, obtain the prior approval of the Commission before selling all or any part of such reacquired assets, other than the sale of manufactured VCM in the ordinary course of business.

Diamond shall not, for a period of ten (10) years from the date of any such reacquisition, convey any such reacquired assets or any part thereof to Goodrich.

X.

It is further ordered, That Goodrich and Diamond Shamrock, upon written request and on reasonable notice, for the purpose of securing compliance with this order, and subject to any legally [11] recognized privilege, shall permit duly authorized representatives of the Commission or of the Director of the Bureau of Competition:

A. Reasonable access during the office hours of Goodrich or Diamond Shamrock, which may have counsel present, to inspect and copy books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in the possession or control of Goodrich or Diamond Shamrock that relate to any matter contained in this order; and

B. Subject to the reasonable convenience of Goodrich or Diamond Shamrock, an opportunity to interview officers or employees of Goodrich or Diamond Shamrock, who may have counsel present, regarding such matters.

XI.

It is further ordered, That Goodrich and Diamond Shamrock shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed corporate change, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation, which may affect compliance with the obligations arising out of this order.

IN THE MATTER OF

SUPERMARKET DEVELOPMENT CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACTS

Docket C-3224. Complaint, Mar. 17, 1988—Decision, Mar. 17, 1988

This consent order requires, among other things, Furr's, a wholly owned subsidiary of Supermarket Development Corporation, to divest supermarkets in 12 towns and cities in Texas and New Mexico, to obtain prior Commission approval for future acquisitions by Furr's of grocery stores located in the geographic area covered by the El Paso division, and to hold separate the El Paso division until the required divestitures are completed.

Appearances

For the Commission: *Joan Greenbaum.*

For the respondents: *Joseph A. DeFrancis, Latham & Watkins,* Washington, D.C. *Joushua F. Greenberg* and *Michael Malina, Kay, Scholer, Fierman, Hays & Handler,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondents, Supermarket Development Corp. ("SDC" or "Furr's") and SSI Associates, L.P. ("Safeway"), entities subject to the jurisdiction of the Federal Trade Commission, have entered into an agreement, described in paragraph 10 herein, that, if consummated, would violate the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; that said agreement and the actions of the respondents to implement that agreement constitute violations of Section 5 of the FTC Act, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definition shall apply:

Supermarket means any full-line retail food store with annual sales of not less than $1.5 million, and which sells primarily a wide variety of canned or frozen foods; dry groceries; non-edible grocery items; fresh meat, poultry and produce (vegetables and fruits). In addition, these stores often sell delicatessen items, bakery items, fresh fish, or other specialty items.

II. SUPERMARKET DEVELOPMENT CORP.

2. Respondent, Supermarket Development Corp., is a corporation organized and existing under the laws of the State of Texas, with executive offices located in Dallas, Texas.

3. SDC owns one hundred percent of the voting securities of Furr's, Inc. and controls the operations of Furr's, Inc.

4. Furr's, Inc. is a corporation organized and existing under the laws of the state of Texas, with its principal place of business in Lubbock, Texas.

5. For the year ending December 31, 1986, SDC had net sales of $906,331,507.

6. Furr's is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. SSI ASSOCIATES, L.P.

7. SSI Associates, L.P. ("Safeway"), is a limited partnership organized and existing under the laws of the State of Delaware, with its principal place of business in San Francisco, California.

8. Safeway owns 96.4 percent of the voting securities of Safeway Stores, Inc. and controls the operations of Safeway Stores, Inc.

9. Safeway Stores, Inc. is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business in Oakland, California.

10. For the year ending January 3, 1987, Safeway had net sales of $20,311,480,000.

11. Safeway is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

12. On or about April 9, 1987, SDC entered into an agreement with Safeway whereby SDC will purchase the El Paso Division of Safeway ("El Paso Division"), which comprises one closed and 59 open conven-

tional supermarkets; one food warehouse; a milk plant; and an ice cream plant. Almost half of the El Paso Division's stores are in Albuquerque, New Mexico, and El Paso, Texas. The rest of the Division's stores are in smaller metropolitan areas and towns in New Mexico and Texas. All are operated under the "Safeway" trade name and are conventional supermarkets. In 1986, the El Paso Division had grocery sales of $530 million. There are nineteen cities and towns in which SDC's Furr's stores and Safeway both operate grocery stores.

V. TRADE AND COMMERCE

A. *Relevant Line of Commerce*

13. A relevant line of commerce in which to analyze Furr's acquisition of the El Paso Division is the retail sale and distribution of food and grocery items in supermarkets.

B. *Relevant Section of the Country*

14. Relevant sections of the country are individual cities and towns in the portions of West Texas and New Mexico served by the El Paso Division.

VI. MARKET STRUCTURE

15. Retail sale and distribution of food and grocery items in supermarkets in each of the following relevant sections of the country is extremely concentrated, whether measured by Herfindahl-Hirschman Indices ("HHI") or by two-firm and four-firm concentration ratios: Fort Stockton and Pecos in Texas; and Alamogordo, Artesia, Clovis, Espanola, Hobbs, Las Vegas, Lovington, Portales, Roswell and Silver City in New Mexico.

VII. BARRIERS TO ENTRY

16. Entry into the markets set out in paragraph 15 herein, in the event of substantial price rises, is unlikely.

VIII. ACTUAL COMPETITION

17. SDC and Safeway are actual competitors in the markets alleged herein.

IX. EFFECT

18. The effect of the acquisition, if consummated, may be substantially to lessen competition in relevant product markets in relevant sections of the country in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. by eliminating direct competition between SDC and Safeway;

b. by increasing the likelihood that SDC will unilaterally exercise market power; and

c. by increasing the likelihood of, or facilitating, collusion where the acquisition would significantly increase already high concentration;

all of which increase the likelihood that firms will increase prices and restrict the output of food and groceries both in the near future and for a longer period of time.

X. VIOLATIONS CHARGED

19. The proposed acquisition of Safeway stores in the twelve markets described above in paragraph 15 would, if consummated, violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

20. The Acquisition agreement set forth in paragraph 12 herein constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition of certain assets of SSI Associates, L.P. ("Safeway") by Furr's, Inc., a wholly owned subsidiary of Supermarket Development Corporation (hereinafter collectively "Furr's"), and Furr's and Safeway, having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge Furr's and Safeway with violations of the Clayton Act and Federal Trade Commission Act; and

Respondents Furr's and Safeway, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

SDC, which owns 100 percent voting securities and controls Furr's, Inc., is a corporation organized and existing under the laws of the State of Texas with its executive offices located at 1500 Diamond Shamrock Tower, Dallas, Texas;

Furr's, Inc., is a corporation organized and existing under the laws of the State of Texas with its executive offices located at 1708 Avenue G., Lubbock, Texas (hereinafter, SDC and Furr's will be referred to as "Furr's");

SSI Associates, L.P., which owns 96.4 percent of the voting securities of Safeway and controls Safeway, is a limited partnership organized and existing under the laws of the State of Delaware with its executive offices located c/o Kohlberg Kravis Roberts & Company, 101 California Street, San Francisco, California;

Safeway is a corporation organized and existing under the laws of the State of Delaware, with its executive offices located at 201 Fourth Street, Oakland, California (hereinafter, SSI and Safeway will be referred to as "Safeway").

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Furr's and Safeway, and the proceeding is in the public interest.

ORDER

I.

As used in this order, the following definitions shall apply:

(A) *"Furr's"* means Furr's, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by Furr's and their respective directors, officers, employees, agents and representatives and their respective successors and assigns, and Supermarket Development Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Supermarket Development Corporation and their respective directors, officers, employees, agents and representatives and their respective successors and assigns.

(B) *"Safeway"* means Safeway, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Safeway and their respective directors, officers, employees, agents and representatives and their respective successors and assigns and SSI Associates, L.P., its predecessors, subsidiaries, divisions, groups and affiliates controlled by SSI Associates, L.P. and their respective directors, officers, employees, agents and representatives and their respective successors and assigns.

(C) *"Acquisition"* means Furr's acquisition of the assets of Safeway's El Paso Division.

(D) *"El Paso Division"* means the sixty grocery stores of Safeway in its El Paso Division, inventory, an administrative building, a distribution center and all related real property and facilities, excluding the dairy and ice cream plants.

(E) *"Assets to be divested"* means the assets described in paragraph II (A), also known as *"II (A) properties."*

(F) *"To be acquired store"* means a retail grocery store in the El Paso Division.

II.

It is ordered, That:

(A) Furr's shall divest, absolutely and in good faith, within nine months from the date this order becomes final, either a store to be acquired or a grocery store presently operated by Furr's in each of the following locations: (a) Alamogordo, New Mexico; (b) Artesia, New Mexico; (c) Clovis, New Mexico; (d) Espanola, New Mexico; (e) Fort Stockton, Texas; (f) Hobbs, New Mexico; (g) Las Vegas, New Mexico; (h) Lovington, New Mexico; (i) Pecos, Texas; (j) Portales, New Mexico; (k) Roswell, New Mexico; and (l) Silver City, New Mexico.

(B) Furr's and Safeway shall maintain the viability and marketability of the assets required to be divested and shall not cause or permit the destruction, removal or impairment of any assets or business to be divested except in the ordinary course of business and except for ordinary wear and tear.

(C) The divestitures required by paragraph II (A) shall be divested to an acquirer or acquirers, and only in a manner, that receives the prior approval of the Commission. The purpose of the divestiture and agreements is to ensure the continuation of the assets as ongoing, viable enterprises engaged in the retail sale of groceries and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

(D) If Furr's has not secured approval from the Commission of a divestiture of all the properties within the nine-month period specified in paragraph II (A), Furr's consents to the appointment by the Commission of a trustee to divest the properties. In the event that the Commission brings an action pursuant to Section 5 (l) of the Federal

Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, Furr's consents to the appointment of a trustee in such action. The appointment of a trustee shall not preclude the Commission from seeking civil penalties and other relief available to it for any failure by Furr's to comply with this order.

(E) If a trustee is appointed by the Commission or a court pursuant to paragraph II (D) of this order, Furr's consents to the following terms and conditions regarding the trustee's duties and responsibilities:

1. The Commission shall select the trustee, subject to Furr's consent, which shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall have the power and authority to divest any properties listed in paragraph II (A) in any location listed therein in which a store has not been divested or for which a contract of sale has not been approved by the Commission within the time period for divestiture in paragraph II (A). The trustee shall have six months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission and, if the trustee is appointed by a court, subject also to the prior approval of the court.

3. If, at the end of the six-month period, the trustee has not secured approval of divestiture as required by paragraph II (A), the trustee may, if the Commission requires in order to accomplish the divestiture, add such other assets acquired pursuant to the acquisition as are required to effectuate the divestiture of the II (A) properties.

4. The trustee shall have full and complete access to the personnel, books, records and facilities of any store that the trustee has the duty to divest, and Furr's shall develop such financial or other information relevant to the assets to be divested as such trustee may reasonably request. Furr's shall cooperate with the trustee, and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

5. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with the order's absolute and unconditional obligation to divest and the purposes of the divestiture as stated in paragraph II (C).

6. The trustee shall serve at the cost and expense of Furr's on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission or the court of the account of the trustee, including fees for his or her

services, all remaining monies shall be paid to Furr's and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting the trust property.

7. Within 20 days of the appointment of the trustee, Furr's shall, subject to the Commission's prior approval, and consistent with provisions of this order, transfer to the trustee all rights and powers necessary to permit the trustee to cause divestiture and sign agreements for the divestiture of the trust properties.

8. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed.

9. The trustee shall report in writing to the Commission and Furr's every sixty days concerning the trustee's efforts to accomplish divestiture.

(F) The Agreement to Hold Separate shall continue in effect until such time as a store in each of the locations listed in paragraph II (A) has been divested either by Furr's or a trustee.

III.

It is further ordered, That within sixty days after the date of service of this order, and every sixty days thereafter until Furr's and Safeway have fully complied with the provisions of paragraph II of this order, Furr's and Safeway shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying with, or have complied with that provision. Furr's and Safeway shall include in compliance reports, among other things that are required from time to time, a full description of contacts or negotiations for the divestiture of the II (A) properties, including the identity of all parties contacted. Furr's and Safeway also shall include in compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture.

IV.

It is further ordered, That for a period commencing on the date of service of this order and continuing for ten years from and after the date of service of this order, Furr's shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, any retail grocery store, including any facility that has been operated as a retail grocery store within six months of the date of the offer to purchase the facility, or any interest in a retail grocery store or any interest in

best copy available

any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates a retail grocery store in the following cities or towns: Albuquerque, New Mexico; Alamogordo, New Mexico; Artesia, New Mexico; Carlsbad, New Mexico; Clovis, New Mexico; El Paso, Texas; Espanola, New Mexico; Fort Stockton, Texas; Hobbs, New Mexico; Las Cruces, New Mexico; Las Vegas, New Mexico; Lovington, New Mexico; Midland, Texas; Odessa, Texas; Pecos, Texas; Portales, New Mexico; Roswell, New Mexico; Santa Fe, New Mexico; and Silver City, New Mexico.
Provided, however, That these prohibitions shall not relate to the construction of new facilities by Furr's or the leasing of a facility by Furr's not presently a grocery store in those locations.

One year from the date of service of this order and annually thereafter, Furr's shall file with the Commission a verified written report of its compliance with this paragraph.

V.

For the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to Furr's or Safeway made to their principal offices, Furr's and Safeway shall permit any duly authorized representatives of the Commission:

1. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts and correspondence, memoranda and other records and documents in the possession or under the control of Furr's or Safeway relating to any matters contained in this order; and
2. Upon five days' notice to Furr's or Safeway and without restraint or interference from them, to interview officers or employees of Furr's or Safeway, who may have counsel present, regarding such matters.

It is further ordered, That Furr's shall notify the Commission at least thirty days prior to any change in its corporate structure that may affect compliance obligations arising out of this order including but not limited to dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change.

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

This case concerns an effort by Supermarket Development Corporation—and Furr's, a wholly owned subsidiary—to acquire the El Paso Division of Safeway Stores, including sixty grocery stores and a variety of other assets. The order the Commission has accepted requires Furr's, *inter alia*, to divest one store in each of twelve towns in Texas and New Mexico, and creates an elaborate mechanism to ensure that those divestitures are made. In particular, the order requires Furr's to hold the entire Safeway El Paso Division separate from its own operations until it makes the twelve divestitures. Moreover, if Furr's fails to make the divestitures within nine months, a trustee will be appointed to assume that responsibility. The order also requires Furr's to seek Commission approval—over a ten year period—of any acquisition of a retail grocery store in any of nineteen areas in Texas and New Mexico, including Albuquerque and Santa Fe, New Mexico; and El Paso, Odessa, and Midland, Texas.[1]

As a consequence of these provisions, the consent order process has prevented Furr's from immediately integrating the El Paso Division into its own operations. As a result, Furr's has not yet been able to take advantage of the efficiencies associated with the acquisition, and consumers have not yet received the benefits of the acquisition, in the form of lower prices, better service, and other advantages.

Consent orders frequently have adverse effects of this sort, but those effects are usually outweighed by the need to prevent or undo the anticompetitive aspects of the mergers they address. In this matter, however, there is good reason to think that the order need not have been imposed. In its earlier consultations with the Commission staff, Furr's evinced a willingness to remedy all of the possibly anticompetitive aspects of the acquisition *prior* to its consummation. If the Commission had accepted that approach, the consent order would not have been necessary. Moreover, Furr's would have been able to take advantage of the efficiencies the acquisition offers immediately, and to begin offering lower prices and other advantages to consumers immediately, instead of many months later. In short, in my view, the public interest would have been better served by accepting the Furr's "fix-it-first" approach.

I regret that the Commission chose instead—in July 1987—to authorize our staff to seek to enjoin the entire acquisition. I opposed that decision because I felt that it was premature in light of the proposals that Furr's had made. I have nevertheless voted to accept the consent order because that course is preferable to the litigation alternative.

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[1] In addition to the concerns with the consent order noted in the text, I do not believe that the prior approval provision in the order should apply to any markets other than the twelve in which divestitures are required. The Commission has determined that the appropriateness of prior approval provisions depends on "industry market structure and market conditions." *American Medical International*, 104 FTC 1, 224 (1984); *accord, Hospital Corp. of America*, 106 FTC 361, 514–15 (1985), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, No. 86–1492 (U.S. May 3, 1987). It is not clear from the record that "market conditions and market structure in [the seven additional markets] are such that all such acquisitions . . . necessarily [would be] anticompetitive." *See American Medical International*, 104 FTC at 225; *see also Hospital Corp. of America*, 106 FTC at 513–17.

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

Docket 9189. Interlocutory Order, April 8, 1988

ORDER

Counsel for General Motors respondents, having informed the Commission of the death of respondent William M. Packer, Jr., moved for dismissal of the complaint against Mr. Packer. Complaint counsel had no objection to the motion. Therefore,

It is ordered, That the complaint against Mr. Packer be, and it hereby is, dismissed.

Commissioner Bailey not participating.

IN THE MATTER OF

THE SILVER GROUP, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 & 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3225. Complaint, April 13, 1988—Decision, April 13, 1988

This consent order prohibits, among other things, a San Francisco-based marketer of artificial tanning devices from misrepresenting that its devices do not pose for users a risk of any harmful side effect associated with sun exposure. Respondent is required to have reliable and competent scientific evidence for any health or safety claim it makes in any advertisement.

Appearances

For the Commission: *Brinley H. Williams.*

For the respondent: *Eugene I. Lambert, Covington & Burling,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Silver Group, Inc., a corporation, ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent is a California corporation, with its office and principal place of business located at 379 Oyster Point Boulevard, South San Francisco, California.

PAR. 2. Respondent has advertised, offered for sale, sold and distributed tanning devices and related products for the artificial tanning of humans, including tanning beds, facial units, and overhead lamp systems, and other products to the public. Respondent's tanning devices are marketed under such trade names as Silver Solarium.

PAR. 3. The acts or practices of respondent alleged in this complaint have been in or affecting commerce.

PAR. 4. Respondent has disseminated and caused the dissemination of advertisements and promotional materials for its tanning devices published in magazines and broadcasted on television across state lines, and disseminated in product brochures and other sales literature directly to consumers or to distributors for display or distribution to consumers. Typical of respondent's advertisements, but not necessarily all - inclusive thereof, are the attached Exhibits A through D. The aforesaid advertisements contain the following statements or depictions:

1. "new way to tan indoors with absolutely no harmful side effects associated with the sun." (Exhibit A)

2. "absolutely no burning, no drying and no sun damage." (Exhibit A)

3. "Silver system will tan you deeper and more safely than anything under the sun." (Exhibit B)

4. "SILVER SOLARIUM bans burns and sun damage to deliver the perfect tan." (Exhibit C)

5. "For the perfect tan, get the perfect solution to the sun, SILVER SOLARIUM." (Exhibit C)

6. "Safer Than The Sun!" (Exhibit A)

7. "Will my skin age faster? No. Unlike the sun, the harmful rays that cause elastosis are not present in the Silver System." (Exhibit D).

PAR. 5. Through the use of the statements and depictions referred to in paragraph four and others in advertisements not specifically set forth herein, respondent has represented, directly or by implication, that:

1. Use of respondent's tanning devices cannot contribute to skin aging.

2. Respondent's tanning devices can be used without the risk of any harmful side effect associated with the sun.

3. Use of respondent's tanning devices cannot increase the risk of skin cancer.

PAR. 6. In truth and in fact:

1. Use of respondent's tanning devices can contribute to skin aging.

2. Respondent's tanning devices cannot be used without the risk of any harmful side effect.

3. Use of respondent's tanning devices can increase the risk of developing skin cancer.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the use of the representations referred to in paragraphs four and five and others not specifically set forth herein, respondent has represented, directly or by implication, that at the time it made the representations it possessed and relied upon a reasonable basis consisting of competent and reliable scientific evidence for said representations.

PAR. 8. In truth and in fact, respondent did not possess and rely upon a reasonable basis for making such representations. Therefore, respondent's representations as set forth herein were and are false and misleading.

PAR. 9. In the advertising and sale of its tanning devices, respondent has, as alleged in paragraph four, used terms such as "safer than the sun" and "no harmful side effects" without disclosing that the use of such devices poses an increased risk of skin cancer and skin aging. These facts would be material to consumers. The failure to disclose these facts, in light of the representations made as alleged in paragraph five, is a deceptive practice.

PAR. 10. The acts and practices of respondent as alleged in this complaint, and the placement in the hands of others of the means and instrumentalities by and through which others may have used said acts and practices, constitute unfair or deceptive acts or practices in or affecting commerce and the dissemination of false advertisements in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

TRAINING TRAINING TRAINING

EXHIBIT A

For Immediate Release

Safer Than The Sun!

We've waged war on the sun and won! It's no longer necessary to spend long hours in the sun to tan. Silver Solarium's innovative tanning center introduce an entirely new way to tan indoors with absolutely no harmful side effects associated with the sun.

Consider the facts: Doctors world-wide are against the dangers of direct exposure of skin to sunlight. Too much sun burns, dries out and permanently damages the skin. The damage is done by ultraviolet rays emitted by the sun, particularily UV-B rays. UV-B rays work with UV-A rays to tan you by stimulating the melanin (pigmentation) in your skin. Too many UV-B rays cause burning and ultimately damage your skin. The problem is how to control the amount of UV-B rays while allowing the gentle UV-A rays to tan you.

The solution is to block out the burning UV-B rays. Sunscreens do it to a limited extent but skin damage still occurs. Silver Solarium's state-of-the art tanning beds effectively filter out the burning UV-B rays while intensifying the healthful UV-A tanning rays. You'll tan faster and darker with absolutely no burning, no drying and no sun damage! Your tan will look better longer and so will your skin!

For more information visit the Silver Tanning Center nearest you

EXHIBIT B

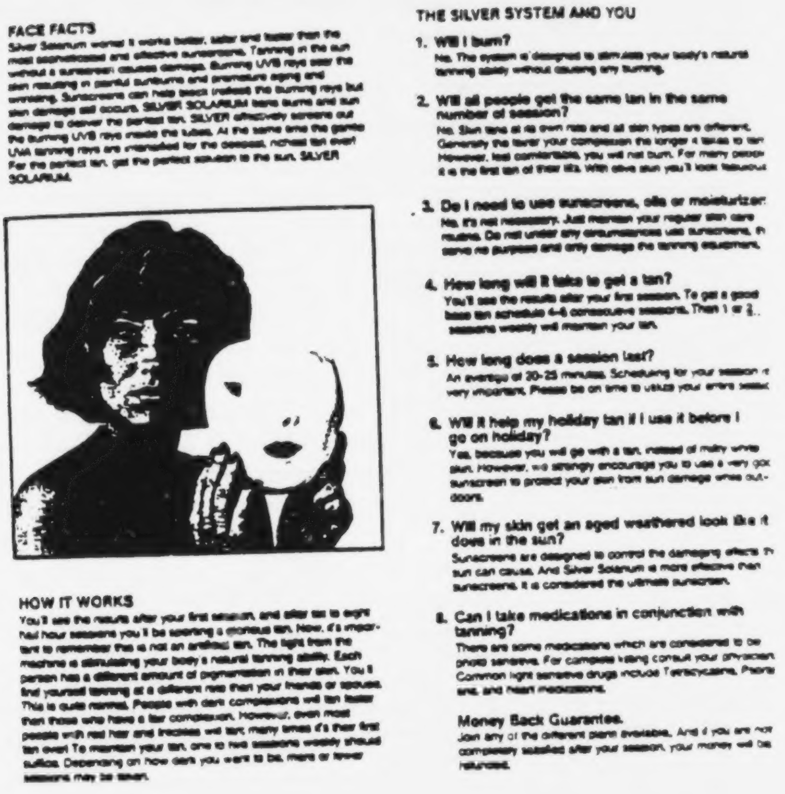
TRAINING TRAINING TRAINING

Radio Ad
Silver Tanning Center

:60

Here's something you really should know if you're searching for that perfect suntan! Doctors the world over warn constantly against over exposing your skin to sunlight! The sun sears, bakes and burns the skin. It adds wrinkles and creases, and even the finest sunscreens can't protect you from that! So how do you avoid skin damage? Drop into NAME. NAME takes you out of the sun and tans you in minutes, not hours! NAME using the Silver system, will tan you deeper and more safely than anything under the sun. The Silver tanning system filters out the UV-B rays the sun emits, the rays that scorch the skin, and intensifies the UV-A rays that tan the skin! Want the perfect tan? Introduce yourself to the Silver tanning system at NAME! Or call NAME at PHONE NUMBER! That's NAME! There's nothing like it under the sun!

EXHIBIT C



FACE FACTS

Silver Solarium works! It works better, safer and faster than the most sophisticated and effective sunscreens. Tanning in the sun without a sunscreen causes damage. Burning UVB rays scar the skin resulting in painful sunburns and premature aging and wrinkling. Sunscreens can help block (reflect) the burning rays but skin damage still occurs. SILVER SOLARIUM bans burns and sun damage to deliver the perfect tan. SILVER effectively screens out the burning UVB rays inside the tubes. At the same time the gentle UVA tanning rays are intensified for the deepest, richest tan ever! For the perfect tan, get the perfect solution to the sun. SILVER SOLARIUM.

HOW IT WORKS

You'll see the results after your first session, and after six to eight half hour sessions you'll be sporting a glorious tan. Now, it's important to remember this is not an artificial tan. The light from the machine is stimulating your body's natural tanning ability. Each person has a different amount of pigmentation in their skin. You'll find yourself tanning at a different rate than your friends or spouses. This is quite normal. People with dark complexions will tan faster than those who have a fair complexion. However, even most people with red hair and freckles will tan; many times it's their first tan ever! To maintain your tan, one to two sessions weekly should suffice. Depending on how dark you want to be, more or fewer sessions may be taken.

THE SILVER SYSTEM AND YOU

1. **Will I burn?**
   No. The system is designed to stimulate your body's natural tanning ability without causing any burning.

2. **Will all people get the same tan in the same number of session?**
   No. Skin tans at its own rate and all skin types are different. Generally the fairer your complexion the longer it takes to tan. However, feel comfortable, you will not burn. For many people it is the first tan of their life. With olive skin you'll look fabulous

3. **Do I need to use sunscreens, oils or moisturizer**
   No, it's not necessary. Just maintain your regular skin care routine. Do not under any circumstances use sunscreens, th serve no purpose and only damage the tanning equipment.

4. **How long will it take to get a tan?**
   You'll see the results after your first session. To get a good base tan schedule 4-6 consecutive sessions. Then 1 or 2 sessions weekly will maintain your tan.

5. **How long does a session last?**
   An average of 20-25 minutes. Scheduling for your session i very important. Please be on time to utilize your entire sessio

6. **Will it help my holiday tan if I use it before I go on holiday?**
   Yes, because you will go with a tan, instead of milky white skin. However, we strongly encourage you to use a very go sunscreen to protect your skin from sun damage while outdoors.

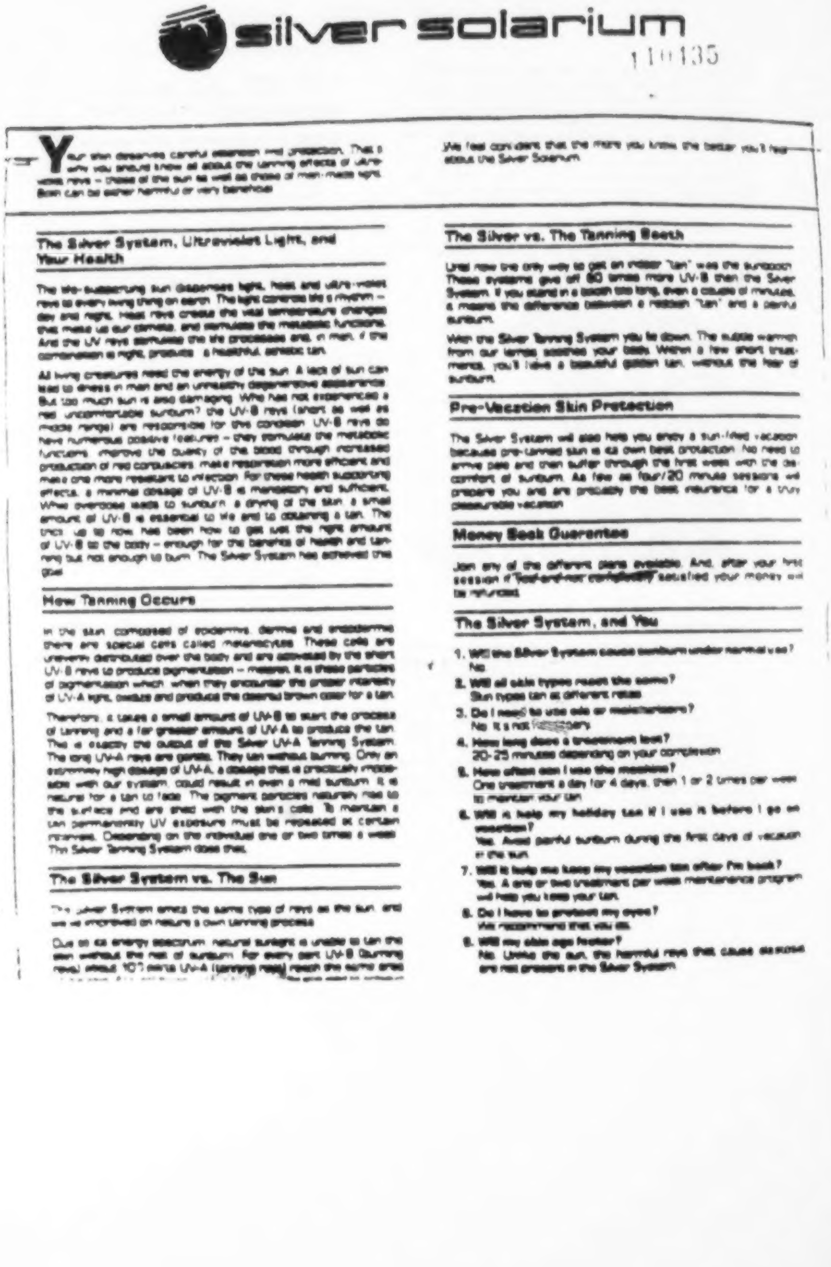
7. **Will my skin get an aged weathered look like it does in the sun?**
   Sunscreens are designed to control the damaging effects th sun can cause. And Silver Solarium is more effective than sunscreens. It is considered the ultimate sunscreen.

8. **Can I take medications in conjunction with tanning?**
   There are some medications which are considered to be photo sensitive. For complete listing consult your physician. Common light sensitive drugs include Tetracyclines, Psoraens, and heart medications.

Money Back Guarantee.

Join any of the different plans available. And if you are not completely satisfied after your session, your money will be refunded.

EXHIBIT D



silver solarium

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Your skin deserves careful attention and protection. That's why you should know all about the tanning effects of ultra-violet rays – those of the sun as well as those of man-made light. Both can be either harmful or very beneficial.

We feel confident that the more you know the better you'll feel about the Silver Solarium.

The Silver System, Ultraviolet Light, and Your Health

The life-sustaining sun dispenses light, heat and ultra-violet rays to every living thing on earth. The light controls life's rhythm – day and night. Heat rays create the vital temperature changes that make up our climate, and stimulate the metabolic functions. And the UV rays stimulate the life processes and, in man, if the combination is right, produce a healthful, esthetic tan.

All living creatures need the energy of the sun. A lack of sun can lead to illness in man and an unhealthy degenerative appearance. But too much sun is also damaging. Who has not experienced a real uncomfortable sunburn? the UV-B rays (short as well as middle range) are responsible for this condition. UV-B rays do have numerous positive features – they stimulate the metabolic functions, improve the quality of the blood through increased production of red corpuscles, make respiration more efficient and make one more resistant to infection. For these health supporting effects, a minimal dosage of UV-B is mandatory and sufficient. While overdose leads to sunburn, a drying of the skin, a small amount of UV-B is essential to life and to obtaining a tan. The trick up to now has been how to get just the right amount of UV-B to the body – enough for the benefits of health and tanning but not enough to burn. The Silver System has achieved this goal.

How Tanning Occurs

In the skin, composed of epidermis, dermis and endodermis there are special cells called melanocytes. These cells are unevenly distributed over the body and are activated by the short UV-B rays to produce pigmentation – melanin. It is these particles of pigmentation which, when they encounter the greater intensity of UV-A light, oxidize and produce the desired brown color for a tan.

Therefore, it takes a small amount of UV-B to start the process of tanning and a far greater amount of UV-A to produce the tan. This is exactly the output of the Silver UV-A Tanning System. The long UV-A rays are gentle. They tan without burning. Only an extremely high dosage of UV-A, a dosage that is practically impossible with our system, could result in even a mild sunburn. It is natural for a tan to fade. The pigment particles naturally rise to the surface and are shed with the skin's cells. To maintain a tan permanently UV exposure must be repeated at certain intervals. Depending on the individual one or two times a week. The Silver Tanning System does this.

The Silver System vs. The Sun

The Silver System emits the same type of rays as the sun, and we've improved on nature's own tanning process.

Due to its energy spectrum, natural sunlight is unable to tan the skin without the risk of sunburn. For every part UV-B (burning rays) about 10[illegible] parts UV-A (tanning rays) reach the same area [illegible]

The Silver vs. The Tanning Booth

Until now the only way to get an indoor "tan" was the sunbooth. These systems give off 80 times more UV-B than the Silver System. If you stand in a booth too long, even a couple of minutes, it means the difference between a reddish "tan" and a painful sunburn.

With the Silver Tanning System you lie down. The subtle warmth from our lamps soothes your body. Within a few short treatments, you'll have a beautiful golden tan, without the fear of sunburn.

Pre-Vacation Skin Protection

The Silver System will also help you enjoy a sun-filled vacation because pre-tanned skin is its own best protection. No need to arrive pale and then suffer through the first week with the discomfort of sunburn. As few as four/20 minute sessions will prepare you and are probably the best insurance for a truly pleasurable vacation.

Money Back Guarantee

Join any of the different plans available. And, after your first session if ~~not and not completely~~ satisfied your money will be refunded.

The Silver System, and You

1. **Will the Silver System cause sunburn under normal use?**
   No.
2. **Will all skin types react the same?**
   Skin types tan at different rates.
3. **Do I need to use oils or moisturizers?**
   No. It's not necessary.
4. **How long does a treatment last?**
   20-25 minutes depending on your complexion.
5. **How often can I use the machine?**
   One treatment a day for 4 days, then 1 or 2 times per week to maintain your tan.
6. **Will it help my holiday tan if I use it before I go on vacation?**
   Yes. Avoid painful sunburn during the first days of vacation in the sun.
7. **Will it help me keep my vacation tan after I'm back?**
   Yes. A one or two treatment per week maintenance program will help you keep your tan.
8. **Do I have to protect my eyes?**
   We recommend that you do.
9. **Will my skin age faster?**
   No. Unlike the sun, the harmful rays that cause [illegible] are not present in the Silver System.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent The Silver Group, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. The Silver Group has its offices and principal place of business at 379 Oyster Point Boulevard, South San Francisco, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

DEFINITION

For the purpose of this order, the following definition shall apply:

"Tanning device" means any product designed to incorporate one or more ultraviolet lamps and intended for irradiation of any part of the living human body by ultraviolet radiation to induce skin tanning.

I.

It is ordered, That respondent The Silver Group, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any tanning device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting directly or by implication that:

a. Use of any such device does not pose a risk of the harmful side effects associated with exposure to the sun's radiation;
b. Use of any such device does not increase the risk of developing skin cancer;
c. Use of any such device does not contribute to skin aging.

II.

It is further ordered, That for one year after the date of service of this order respondent The Silver Group, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any tanning device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to prominently disclose in any print advertisement, film, video tape or any other promotional material the following statement:

NOTICE - Read the mandatory FDA warning label found on every tanning machine for important information on potential eye injury, skin cancer, skin aging and photosensitive reactions.

The above-required language shall be included in printed material printed in a typeface and color that are clear and conspicuous, and, in multipage documents, shall appear on the cover or first page; and in any film, video tape, or slide promotional material shall be included either orally or visually in a manner designed to ensure clarity and prominence; provided, further, that nothing contrary to, inconsistent with, or in mitigation of the above-required statement shall be used in any advertising or promotional materials.

III.

It is further ordered, That commencing one year after the date of service of this order respondent The Silver Group, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any tanning device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making in any print advertisement, film, video tape or any other promotional material any representation, directly or by implication, that the tanning device is safe or safer than other devices or methods of tanning or that the device has health benefits unless the following statement is given:

NOTICE - Read the mandatory FDA warning label found on every tanning machine for important information on potential eye injury, skin cancer, skin aging and photosensitive reactions.

The above-required language shall be included in printed material printed in a typeface and color that are clear and conspicuous, and, in multipage documents, shall appear on the cover or first page; and in any film, video tape, or slide promotional material shall be included either orally or visually in a manner designed to ensure clarity and prominence; provided, further, that nothing contrary to, inconsistent with, or in mitigation of the above-required statement shall be used in any advertising or promotional materials.

IV.

It is further ordered, That respondent The Silver Group, Inc., its successors and assigns and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of any product for personal or household use, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making directly or by implication, any health or safety representation, unless, at the time of such representation, respondent possesses and relies upon a reasonable basis for each such representation, consisting of reliable and competent scientific evidence that substantiates such representation; provided however, that to the extent such evidence of a reasonable basis consists of scientific or professional tests, analyses, research, studies or any other evidence based on expertise of professionals in the relevant area, such evidence shall be "reliable and competent" only if those tests, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, and using procedures generally accepted in the profession to yield accurate and reliable results.

V.

It is further ordered, That respondent shall distribute a copy of this order to each current officer, employee, agent and or representative having sales or promotional responsibilities with respect to the subject matter of this order, and to each current dealer, distributor and purchaser or lessee for commercial use, of its tanning devices, such as health clubs, tanning salons, beauty salons, catalogue houses, and tanning device retailers. A dealer, distributor, purchaser, or lessee is "current" for purposes of this paragraph if it holds a device on consignment for sale; purchased a device for resale or other commercial purpose within the two-year period preceding service of this order; received from respondent, within that two-year period, either directly or indirectly, any promotional or advertising material for the sale or other commercial use of the devices or to whom respondent directly or indirectly provided financial advertising support; or leases a device for commercial purposes from respondent.

VI.

It is further ordered, That for three (3) years from the date that the representations to which they pertain are last disseminated, respondent, its successors and assigns shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials relied upon to substantiate any claim or representation covered by this order; and

B. All test reports, studies, surveys, or other materials in its possession or control or of which it has knowledge that contradict, qualify, or call into question such representation or the basis upon which respondent relied for such representation, including complaints from consumers.

VII.

It is further ordered, That for ten (10) years after the date of service of this order respondent, its successors and assigns shall maintain for three (3) years from the last date of dissemination of the material a copy of each nonidentical form of promotional and training material disseminated by respondent and upon request make such material available to the Federal Trade Commission or its staff for inspection and copying.

VIII.

It is further ordered, That for ten (10) years after the date of service of this order respondent, its successors and assigns shall maintain for three (3) years and upon request make available to the Federal Trade Commission for inspection and copying records of the name and last known address of each dealer, distributor and purchaser or lessee for commercial use of respondent's tanning devices to whom respondent provided, directly or indirectly through a distributor or other representative, any promotional or advertising material for the sale or other commercial use of the devices or to whom respondent directly or indirectly provided financial advertising support.

IX.

It is further ordered, That respondent, its successors and assigns, shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

X.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon it and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied or intends to comply with this order.

Commissioner Bailey not participating.

IN THE MATTER OF

VOLKSWAGEN OF AMERICA, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9154. Complaint, April 1, 1981--Decision, April 13, 1988

This consent order requires, among other things, a Troy, Mich. automobile company to offer an arbitration program to owners of certain Volkswagen and Audi automobiles with faulty valve seals and other oil consumption-related problems.

Appearances

For the Commission: *Robert M. Doyle.*

For the respondents: *Herbert Rubin, Herzfeld & Rubin, P.C.,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Volkswagen of America, Inc., a corporation subject to the Commission's jurisdiction, hereinafter sometimes referred to as respondent VWoA, and Volkswagenwerk Aktiengesellschaft, a corporation subject to the Commission's jurisdiction, hereinafter sometimes referred to as respondent VWAG, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Volkswagen of America, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 27621 Parkview Road, Warren, Michigan. Respondent VWoA is a subsidiary of respondent VWAG.

Respondent Volkswagenwerk Aktiengesellschaft is a corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its principal office and place of business located at 3180 Wolfsburg, West Germany. VWAG dominates or controls the acts and practices of its subsidiary, respondent VWoA.

PAR. 2. Respondent VWoA is now and has been engaged in the production, distribution, offering for sale or sale of vehicles or vehicle parts.

Par. 3. Respondent VWAG is now and has been engaged in the production, distribution, offering for sale or sale of vehicles or vehicle parts delivered to purchasers in the United States. [2]

Par. 4. Respondent VWAG, directly or through its subsidiaries, maintains and has maintained a substantial course of business, including some of the acts and practices alleged in this complaint, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent VWoA maintains and has maintained a substantial course of business, including some of the acts and practices alleged in this complaint, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

Par. 5. Respondents cooperate and act together in effecting some of the acts and practices as hereinafter set forth.

Par. 6. An abnormally high number of Volkswagen and Audi vehicles sold in the United States beginning in the 1974 model year and continuing at least through the 1979 model year and equipped with water-cooled engines have experienced, are experiencing, or are likely to experience one or more of the following conditions:

a. engine problems which may require expensive engine repairs when high rates of oil consumption are experienced; these repairs may include, but are not limited to, replacement of valve stem seals, replacement of cylinder heads, or other valve repairs;

b. engine failures related to lack of oil;

Such conditions are costly to correct or may significantly affect the quality, reliability, durability, or performance of the vehicles.

Par. 7. Respondents knew or should have known that the conditions described in paragraph six above exist.

Par. 8. Respondents have failed and are failing to disclose to owners or to prospective purchasers of Volkswagen and Audi vehicles equipped with water-cooled engines facts which relate to the existence, nature, extent, prevention, diagnosis, or proper repair of the conditions described in paragraph six above.

Par. 9. The facts described in paragraph eight above are material to many prospective purchasers because such facts, if known, would be likely to affect their decisions concerning the purchase of Volkswagen and Audi vehicles.

Par. 10. The facts described in paragraph eight above are material to many owners because such facts, if known, would be likely to affect their decisions concerning the maintenance, repair, use or care of Volkswagen and Audi vehicles.

PAR. 11. Respondents have failed and are failing to disclose material facts to prospective purchasers and to owners of Volkswagen and Audi vehicles. [3]

PAR. 12. The acts and practices of respondents in failing to disclose material facts have had and continue to have the capacity and tendency to mislead many members of the public, particularly those who may consider purchasing, or who own, Volkswagen and Audi vehicles.

PAR. 13. The acts and practices of respondents also have caused or continue to cause substantial economic harm to many members of the public who have paid or continue to pay for goods and services which they might not otherwise have purchased if respondents had adequately disclosed such material facts. The goods and services may include, but are not limited to, those sold by respondents for the repair or replacement of components installed in Volkswagen and Audi vehicles.

PAR. 14. The acts and practices of respondents have caused or continue to cause substantial economic harm to many members of the public who do not take preventive measures which they might take if such material facts were adequately disclosed.

PAR. 15. The acts and practices of respondents in failing to disclose material facts as alleged herein were and are all to the prejudice and injury of the public and constitute unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent Volkswagen of America, [2] Inc., of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Volkswagen of America, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 888 West Big Beaver, in the City of Troy, State of Michigan. [3]

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent Volkswagen of America, Inc., and the proceeding is in the public interest.

ORDER

DEFINITIONS

For the purposes of this order, the following definitions shall apply:

A. *"VWoA"* - Volkswagen of America, Inc., and its successors and assigns, and their officers, representatives, agents, and employees.

B. *"Covered Vehicle"* - A 1974–1979 model year gasoline powered Volkswagen or Audi vehicle equipped with a water-cooled engine, that was:

1) distributed for sale in the United States by VWoA,
2) warranted in writing by VWoA, or [4]
3) certified by the manufacturer to the National Highway Traffic Safety Administration and Environmental Protection Agency as meeting Federal safety and emissions standards.

C. *"Specified Claims"* - Claims made at any time prior to the expiration date of this order by present or former owners or lessees (unless the lessor bore the cost of the claim) of covered vehicles concerning excessive oil consumption or engine damage due to lack of lubrication in covered vehicles other than claims for personal injury, damage to property other than the vehicle itself, or consequential damages such as lost value, profits, wages, or business opportunities. Specified claims do not include claims for which the owner or lessee has executed a release in consideration of settlement of an individual lawsuit. Specified claims also do not include claims that are covered by a binding final judgment on the merits in an individual lawsuit.

D. *"Dealer"* - Any person, partnership, firm or corporation which, pursuant to a Volkswagen or Audi Dealer Agreement with VWoA or any of its independent distributors, purchases or receives on consignment from VWoA or its independent distributors vehicles for resale or lease to the public, [5] including persons, partnerships, firms, or corporations owned or operated by VWoA or its independent distributors.

E. *"Internal engine components"* - All gasoline and diesel engine parts, components, and subassemblies included within the complete short block and cylinder head assemblies, including short blocks and cylinder heads, camshafts, valve train components, timing gears, flywheels, pistons, piston rings, crankshafts, connecting rods, and bearings, oil pumps, and associated fasteners, seals and gaskets.

F. *"Product Service Publication" ("PSPs")* - "Product Circulars," "Service Circulars," "Technical Bulletins," and other documents substantially the same in content and purpose issued from time to time by VWoA to dealers, to regional offices or to independent distributors, or individual articles, notices, entries or the like in such documents, which describe, or recommend or discuss:

(1) diagnostic, repair, or maintenance procedures; or

(2) additional parts or upgrades or different replacement parts; or [6]

(3) non-repair information regarding the use and care of vehicles.

If a publication contains more than one subject which is considered a PSP, then each such subject shall be considered to be an individual PSP. PSPs do not include publicly available repair manuals, parts catalogs, price lists or supplements thereto.

G. *"Product Condition"* - The condition of a vehicle that gives rise to any repair, maintenance, use and care or diagnostic procedures or the use of additional, upgraded or different parts, that is or would be described in PSPs.

H. *"PSP Index"* - A document, clear and comprehensible to prospective purchasers and vehicle owners, which contains entries for all PSPs published during the term of this order by VWoA.

(1) Each index shall contain an introductory section, which shall include the following information clearly and conspicuously stated:

(a) an explanation of the PSP Index and the "PSP [7] Highlights" section;

(b) how to obtain PSPs from VWoA and how to review PSPs at VWoA's dealers;

(c) how to locate the "PSP Highlights" section; and

(d) the PSP prepared and issued pursuant to paragraph G(1) of section V.

(2) For each entry in the PSP Index, the following information will be clearly and conspicuously stated:

(a) the particular model(s), model year(s), and Vehicle Identification Numbers (if the PSP does not apply to the entire model year) to which the entry applies or potentially applies;

(b) the subject of the PSP;

(c) the major component or system of components to which the PSP relates;

(d) the identifying number of the PSP to which the entry relates; and [8]

(e) whether there is an entry in the "PSP Highlights" section of the PSP index for the PSP;

(3) The PSP Index shall contain a separate section, readily accessible, entitled "PSP Highlights."

I. *"PSP Highlights"* - Information related to a particular PSP, that includes all of the following items as applicable:

(1) a description of the product condition;

(2) a description of the principal symptoms of the product condition;

(3) the steps or possible steps that can be taken to minimize or avoid the product condition;

(4) a statement that additional, upgraded or different parts are called for to address the product condition;

(5) a statement that the diagnostic, repair or maintenance procedure discussed in the PSP has to be repeated; [9]

(6) a statement of the immediate and long-range performance consequences of the product condition; and, if avoidance of repair costs is a reason for undertaking the procedure, a statement of the estimated repair costs, if known, or, if not known, a characterization of such costs of not performing the procedures in a timely manner;

(7) the following statement: "The estimated cost of repairing this condition is [less than $150] [approximately $150–$250] [approximately $250–$400] [approximately $400–$800] [more than $800]." The cost range included shall be based on the cost calculated according to the formula set forth in Definition J(2);

(8) a description of the underlying PSP(s) sufficient to permit an interested person to identify and order the PSP(s) from VWoA or review it at a dealer; and

(9) to the extent not apparent from the foregoing, a disclosure of the primary intended benefit(s) of this information. [10]

J. *"Costs"* -

(1) "Reference cost" in paragraph D of section I means one hundred sixty-five dollars ($165), adjusted in the month when this order is served and annually thereafter, by a ratio, the numerator of which is the most recently published quarterly "Implicit Price Deflator" (IPD) for the Gross National Product, and the denominator of which is the

IPD for the second quarter of 1985, adjustments to be rounded to the nearest dollar. IPDs used in these annual adjustments shall have been computed using the same base year.

(2) "Cost(s)" other than "reference cost" in paragraph D of section I shall be calculated by adding the suggested retail price for parts which are or may be required and the applicable national average dealer warranty labor rate charges multiplied by the time required to effectuate the repair, replacement, diagnosis or maintenance as determined by the applicable Suggested Repair Times Manual or other labor time guide used by VWoA in the calculation of warranty reimbursement rates.

K. *"Background Statements"* - The documents attached hereto as Attachments A, and A100, B, and B100. [11]

L. *"Claimant"* - Any person, partnership, corporation, or other entity, other than

(1) a dealer, or

(2) any other entity which is engaged in the business of repairing, servicing, selling, leasing or trading motor vehicles or motor vehicle engines, or

(3) a commercial enterprise which operates a fleet of more than fifteen vehicles.

M. *"United States"* - The fifty states, the District of Columbia, and all commonwealths, territories, and possessions.

N. *"Independent distributor"* - World-Wide Volkswagen, Inc., Riviera Motors, Inc., Volkswagen Mid-America, Inc., and any other person, partnership, firm or corporation that distributes VWoA's vehicles to dealers on a regular basis.

O. *"Engine damage due to lack of lubrication"* - Claims of damage to internal engine components caused by insufficient lubrication. [12]

P. *"MQ Service Action Program"* - The recall and reimbursement campaign initiated by VWoA beginning in February 1982 which included offers to replace valve stem seals and to reimburse prior valve stem seal replacement up to $125 in 1977 through 1979 Volkswagen Rabbit and Scirocco vehicles equipped with gasoline engines.

Q. *"Arbitration agreement"* - The form that sets out issues to be arbitrated concerning claims relating to internal engine components as described in Rule 4 of Attachment C.

I.

It is ordered, That respondent Volkswagen of America, Inc., its successors and assigns, and their officers, representatives, agents, and employees, acting directly or through any subsidiary, division, or other device in connection with the advertising, offering for sale, sale, or distribution of any vehicle in or affecting commerce in the United States, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Failing to continue VWoA's program of issuing PSPs in a manner comparable to the program as it existed in the years 1980 through the date of service of this order, with such [13] program to continue to take into account current criteria used for issuing PSPs, such as the frequency with which the product condition has occurred and is expected to occur, the repair costs to the consumer, and the significance to the consumer of the product condition; and failing to utilize information sources such as internal corporate testing and engineering programs, marketing and other surveys purchased or used by VWoA, information from the manufacturer(s) of affected vehicles or vehicle parts, and reports from customers, dealers, and independent distributors.

B. Within 30 days after the date of service of this order, failing to prepare and issue PSP Indexes for the 1985 model year and thereafter failing to prepare and issue PSP Indexes for PSPs issued in each model year after the 1985 model year.

C. Failing to prepare and issue an entry in the PSP Index for each PSP issued, to include each such entry in an updated PSP Index, and to update cumulatively each quarter all PSP Index entries for all PSPs issued by VWoA, with each such updated PSP index to be forwarded to dealers and be available from VWoA within four months after issuance to dealers of any PSP that was not included in a prior index. [14]

D. Failing to prepare and include an entry in the "PSP Highlights" section of the PSP Index, and reference it appropriately in the PSP Index, whenever:

(1) the PSP describes repair, maintenance, or diagnostic procedures not specifically covered in previously applicable repair manuals, either (i) where the cost of such procedures to a customer is reasonably expected to exceed the reference cost, or (ii) where the procedures are intended and designed to prevent future repair or replacement costs to a customer reasonably expected to exceed the reference cost; or

(2) the PSP describes revisions to repair, maintenance, or diagnostic procedures in an existing repair manual where the revisions are intended and designed either (i) to prevent future repair or replacement costs to a customer reasonably expected to exceed the reference cost, or (ii) to reduce such costs by an amount reasonably expected to exceed the reference cost; or

(3) the PSP describes modified (including additional, different, or

upgraded) parts recommendations, where the modification is intended and designed (i) to prevent future repair or replacement costs to a customer reasonably expected to exceed the reference cost, or (ii) to reduce such costs by an amount reasonably expected to exceed the reference cost; [15] or

(4) the PSP describes (i) information revising or updating information contained in owner's manuals or maintenance schedules or (ii) non-repair information regarding the use and care of vehicles by vehicle owners or operators.

E. Beginning with the next model year commencing after the date of service of this order, failing to disclose for each model year, in a clear and conspicuous manner, in each vehicle owner's manual or warranty booklet (where it shall be itemized in the Table of Contents and Index) for each of its vehicle lines,

(1) the following statement in the exact language set forth below:

Updated Service Information You Can Obtain

Volkswagen of America monitors product performance in the field and regularly sends to dealers the latest service information about [VW] [Audi] vehicles. Now, you too can get these bulletins. [16]

Bulletins cover a wide variety of subjects: the proper use and care of your car; costly repairs; inexpensive repairs or adjustments which, if done early may avoid costly future repairs. Some bulletins describe repairs about new or unexpected conditions. Others describe improved repair procedures or parts improvements. All of this information can also help a qualified mechanic better service your vehicle.

Most bulletins apply to conditions affecting a small number of vehicles. Your dealer or a qualified mechanic may have to determine if a specific bulletin applies to your vehicle.

You can order any or all of these bulletins direct from Volkswagen of America or look at them at a [VW] [Audi] dealer. You can purchase a subscription to the bulletins which apply to a particular model and receive them as they are issued, or you can order an index which lists and identifies these bulletins and summarizes the most important ones. You also can order individual bulletins. However, the index is necessary to identify them.

(2) The above statement shall in addition provide at least the following information in clear and comprehensible [17] language:

(a) concerning indexes -

(i) Indexes list each PSP, provide ordering information for individual PSPs, and are cumulatively updated quarterly.

(ii) Indexes contain plain-language highlights and summaries of PSPs describing costly repairs and designed to help prevent major repairs or containing owner use and care information.

(iii) If there is a charge for PSP indexes, it shall be credited against any charge for PSPs ordered.

(iv) When consumers order any index, they will receive the latest applicable index for the model year of the car unless they request an index for a different model year. [18]

(b) concerning PSPs -

(i) The charge for individual PSPs, if any, and how to order them.

(c) concerning subscriptions -

(i) The charge for subscriptions and how to order them.

(ii) That subscribers are entitled to all PSPs published for a model and model year.

(3) The following statement in the exact language set forth below, which shall be made in conjunction with the statement described above, but which shall not precede disclosure of the information described in paragraphs E (2)(a)(i) and (ii) of section I:

CAUTION:

These bulletins are intended for qualified mechanics. They are not meant for the casual do-it-yourselfer. Qualified mechanics have the equipment, tools, safety instructions, and know-how to do a job properly and safely. Improperly performed repairs or maintenance can adversely affect the safety of your vehicle, possibly [19] leading to accident or injury. They may also impair the economy, durability or reliability of your vehicle and may void the warranty on your car. If you are not sure that you can perform a job properly and safely, you should not risk trying to do so.

F. Beginning with the next model year commencing after the date of service of this order,

(1) failing to include for each model year, in each vehicle owner's manual, warranty booklet, or similar literature provided with the vehicle at the time of delivery to the original retail customer a postage-paid ordering coupon to obtain a properly identified PSP index (including PSP Highlights), a PSP, or subscription; or

(2) failing to maintain a toll-free telephone system, which number shall be clearly and conspicuously disclosed in close proximity to the information set out in paragraph E of section I, to enable members of the public to order PSP indexes (including PSP Highlights, PSPs, or a subscription to PSPs). [20]

G. Failing to furnish each dealer with:

(1) each PSP Index (including PSP Highlights) on paper or through such other medium as approved by designated representatives of the Federal Trade Commission, related to the vehicles represented by that dealership; and

(2) each PSP; and

(3) an adequate supply of postage-paid ordering coupons for PSPs, PSP subscriptions and PSP indexes.

H. Beginning with the date of service of this order, and once in each 6-month period thereafter, failing to recommend and urge, in writing, that each dealer shall:

(1) provide information on how to order PSPs to anyone who requests such information;

(2) provide members of the public with ready access to the PSPs and PSP Indexes (including PSP Highlights) furnished to such dealers, including any equipment needed to enable members of the public to read PSPs at dealerships; and [21]

(3) update PSP Indexes (including PSP Highlights) immediately upon receipt.

I. Beginning with the next model year after the date of service of this order, failing to include the following statement, in the exact language set out below, clearly and conspicuously on the face of the label required by the "Automobile Information Disclosure Act," 15 U.S.C. 1231 *et seq.*, (1980) (as amended) on each vehicle distributed by VWoA in the United States:

"UPDATED SERVICE INFORMATION—NOW YOU CAN GET USEFUL BULLETINS AND EASY-TO-READ SUMMARIES TO SERVICE YOUR CAR BETTER AND HELP AVOID COSTLY REPAIRS. THESE ARE THE SAME BULLETINS WE SEND YOUR DEALER. SEE YOUR DEALER'S INDEX OF PRODUCT CIRCULARS FOR DETAILS."

J. Beginning with the next model year after the date of service of this order, failing to include the following statement, in the exact language set out below, clearly and conspicuously, in each principal point of sale catalog distributed by Volkswagen of America for each of its vehicle lines: [22]

A Word About Updated Service Information

[Volkswagen] [Audi] regularly sends its dealers useful service information about our products. [Volkswagen] [Audi] monitors product performance in the field. We then prepare bulletins for servicing our products better and helping to avoid costly repairs. Now you can get these bulletins, too. To get ordering information, see a local [VW] [Audi] dealer.

K. Failing to include detailed information regarding the third-party arbitration program described in sections III and IV, and the PSP program described in this section, in all ongoing and future training programs and in materials disseminated to dealers on subjects related to customer relations, beginning not later than one hundred eighty (180) days after service of this order and continuing for the duration of this order.

II.

It is further ordered, That:

A. Beginning with the date of service of this order, upon **[23]** written request by any person, VWoA shall mail or cause to be mailed, by first class mail, the following:

(1) information describing PSPs, PSP Indexes, and PSP subscriptions, as well as how to obtain PSPs, PSP Indexes and PSP subscriptions;

(2) the most current PSP Index, *provided that,* the "PSP Highlights" in the PSP Index may be limited to the particular vehicle make, model and model year identified in the request;

(3) any specifically identified PSPs;

(4) subscriptions to all PSPs.

B. Subject to the limitations of this section, VWoA may, at its option, impose a reasonable charge for PSPs, PSP Indexes and PSP subscriptions. Any charge for a PSP Index must be credited toward the initial purchase of PSPs themselves. The maximum charges shall be as follows:

(1) For PSP Indexes ordered:

(a) model years prior to 1988, no charge; **[24]**

(b) through 1990, a charge not to exceed two dollars ($2.00) for any PSP Index;

(c) for years 1991 and thereafter, a charge not to exceed three dollars ($3.00) for any PSP Index.

(2) For individual PSPs, a charge not to exceed four dollars ($4.00) for the first PSP requested in each order and two dollars ($2.00) for each additional PSP requested in that order;

(3) For PSP subscriptions, a charge not to exceed the lower of the reasonable cost or the charge (if any) to dealers.

C. VWoA may offer subscriptions of any duration, *provided that,* VWoA offers the option of a subscription with a one-year duration.

III.

It is further ordered, That:

A. VWoA shall make available in the United States to claimants **[25]** an arbitration program, which shall be administered through an independent and impartial third party, to resolve expeditiously and fairly (1) each specified claim regardless of time in service, mileage, or whether the claimant still owns or leases the vehicle; and (2) each claim made or renewed after the date of service of this order by owners and lessees (unless the lessor bore the cost of the claim) of any Volkswagen or Audi vehicle distributed by VWoA, warranted in writing by VWoA, or certified by the manufacturer to the responsible federal agencies as meeting applicable federal safety and emission standards involving the claimed failure, malfunction, repair or replacement of internal engine components while the claimant owns or leases the vehicle, regardless of time in service or mileage.

Provided, however, That VWoA need not make the arbitration program described above available to claimants:

(1) for claims involving repairs required to place in operating condition an engine which was not operable when the vehicle was purchased or leased by an owner or lessee, other than the original retail purchaser or original lessee; or [**26**]

(2) for claims involving internal engine components:

(a) whose claims were the subject of a claim by a prior owner or lessee which was settled or resulted in an arbitration award which the prior owner or lessee accepted, or

(b) if the claimant sells the vehicle prior to sixty days after the claimant notified the independent and impartial third party administrator of the claim, unless the claimant does the following:

(i) notifies VWoA in writing at least ten days before the vehicle is disposed of; and

(ii) gives VWoA an opportunity to inspect the vehicle at a mutually convenient time and place.

B. The decision of the arbitrator shall be binding on VWoA, but non-binding on the claimant, unless the claimant elects to accept an arbitration award. [**27**]

C. (1) With respect to specified claims, such third-party arbitration program shall be conducted in accordance with the Modified Rules for Arbitration published by the Council of Better Business Bureaus as specially modified and set forth in Attachment D, and

(2) With respect to claims relating to internal engine components, such third-party arbitration program shall be conducted in accordance with the Modified Rules for Arbitration published by the Council of Better Business Bureaus as specially modified and set forth in Attachment C.

Provided, however, The Rules for Arbitration may be modified only with the written approval of designated representatives of the Federal Trade Commission.

D. For two years after the date of service of this order, such third-party arbitration program shall be conducted at no charge to the claimant by VWoA or the independent and impartial third-party administrator. Thereafter, no charges shall be imposed on claimants by VWoA or the independent and impartial third-party administrator that exceeds charges specified in the Modified Rules for Arbitration published by the Council of Better Business Bureaus. **[28]**

E. No settlement of or judgment on the merits in a class action lawsuit shall affect a claimant's right to request arbitration of a specified claim or claim relating to internal engine components under this order, *provided that*, a specified claim or claim relating to internal engine components is not eligible for arbitration if:

(1) the claimant received actual notice of the pendency or settlement of the class action; and

(2) the notice of pendency and, if applicable, settlement of such class action was approved by designated representatives of the Federal Trade Commission prior to submission of the notice to the court by VWoA, as fully, accurately, clearly and conspicuously disclosing the availability of the arbitration program described in sections III and IV; and

(3) the claimant did not request exclusion from the class action or settlement, or the claimant received payment pursuant to the class action settlement or judgment on the merits; **[29]**

Provided, however, That arbitration shall continue to be available during the pendency of the class action proceeding until settlement or judgment is entered on the merits, regardless of whether the claimant requested exclusion from the proceeding.

F. Such third-party arbitration program shall be fully operational pursuant to the terms of this order no later than forty-five (45) days after the date of service of this order, and thereafter expanded as demands on the program may require to resolve consumer complaints expeditiously.

G. VWoA shall, by first class mail, mail or cause to be mailed Attachment G in response to any claimant with a claim relating to internal engine components, within thirty days after receipt of such claim, unless the claimant's request for repair or reimbursement or other compensation is fully met.

H. Notwithstanding any other provision of this order, the mediation and arbitration program described in sections III and IV shall be available to members of the armed forces stationed at military installations located outside the United States and their dependents, *provided, however,* that only arbitration by mail must be available as long as such claimants are located outside the United States. **[30]**

IV.

It is further ordered, That:

A. Prior to sixty (60) days after the date of service of this order, VWoA shall contact, by first-class mail, each attorney general's office (or such other office as may be appropriate) of the fifty states, the District of Columbia, commonwealths, territories and possessions, and shall:

(1) Provide each such office with a copy of this order.

(2) Describe in such mailing VWoA's third-party arbitration program.

(3) Describe in such mailing the PSPs and PSP Indexes and explain how consumers can obtain them.

(4) Inform each such office that VWoA will, if the appropriate office wishes, within fifteen days after receipt from such office or sixty days after the date of service of this order, whichever is later, notify by first-class mail each person who has complained to that **[31]** office about a specified claim, and that VWoA will provide that person in the same mailing envelope with:

(a) information about the availability of VWoA's third-party arbitration program; and

(b) one or more of the appropriate Background Statements as required to be distributed pursuant to paragraph B of section IV in connection with any specified claim.

(5) Request that each such office provide VWoA with (a) a copy of each complaint that may include a specified claim; or, at the option of that office, (b) the owner's name and address, and the nature of the specified claim.

(6) Inform each such office that VWoA will also send, by first-class mail, a notice to any person who has complained to any other state or local law enforcement or consumer affairs office about a specified claim, and urge such office to encourage state and local law enforcement or consumer affairs offices to forward to VWoA either copies of such complaints, or, at the option of the forwarding office, a list of the names, and addresses of persons with specified claims and the amount and nature of each such claim, if known. **[32]**

B. For purposes of paragraph B of section IV only:

- a *"claim"* has been made if, for any oral or written request for reimbursement or repair, a document was created or received by VWoA or any of its independent distributors, including, but not limited to, warranty records, consumer letters, dealer reports, or records of telephone complaints;

– *"open or unsatisfactorily resolved"* claims are any claims for which the claimant did not receive all payments or free repairs claimed or requested.

VWoA shall send by first class mail Attachments A(or A100, if the vehicle was an Audi 100), B (or B100 if the vehicle was an Audi 100), E (2) and F, and a postage-paid return envelope, or, if VWoA wishes to make an initial settlement offer, Attachments A(or A100 if the vehicle was an Audi 100), B (or B100 if the vehicle was an Audi 100), E(1) and F, and a postage-paid return envelope to the following:

(1) every claimant who, prior to the date of service of this order, had made a specified claim to VWoA that is open or unsatisfactorily resolved or who, prior to the **[33]** date of service of this order notified VWoA's independent distributors of such claim(s);

(2) every claimant who has received reimbursement of $125 under VWoA's MQ service action program, and who submitted repair orders or other documentation showing that one or more of the following repairs occurred at a total expense of more than $125.00 which has not been fully reimbursed as of the date of service of this order:

(a) cylinder head replacement;

(b) any repair involving cylinder head removal and valve repair;

(c) replacement of the engine short block;

(d) replacement of any one or more of the following: (i) crankshaft; (ii) connecting rod(s); (iii) main bearing(s); (iv) connecting rod bearing(s); (v) pistons; (vi) piston rings. **[34]**

(3) every claimant with a specified claim whose name had been supplied to VWoA by the offices referred to in paragraph A of section IV, the Federal Trade Commission, or any other consumer affairs office or any third party, and whose specified claim remains open or unsatisfactorily resolved prior to the date of service of this order.

(4) every claimant with a specified claim which is open or unsatisfactorily resolved whose name will have been supplied to VWoA after the date of service of this order by the offices referred to in paragraph A of section IV, the Federal Trade Commission, or any other consumer affairs office or any third party; and

(5) every claimant with a specified claim which is open or unsatisfactorily resolved who, orally or in writing, contacts VWoA, any office of the independent and impartial third party administrator, or VWoA's independent distributors after April 15, 1987, the date the Commission accepted this order for comment.

Provided, however, That for any mailing made pursuant to this section which is returned to the sender as being undeliverable, VWoA shall make a reasonable attempt to obtain **[35]** the claimant's current address, and shall send the mailing by first class mail to the claimant's current address; *provided, further,* Attachments A and B or Attachments A100 and B100, as applicable, shall be fastened or otherwise physically attached with Attachment B (or Attachment B100) on top of Attachment A (or Attachment A100).

C. The following deadlines shall apply:

(1) For initially mailing the materials specified in paragraph B of section IV:

(a) With respect to claimants included in paragraphs B(1), (2) and (3) of section IV, all materials shall be mailed according to the following schedule:

(i) not less than 25% of the total number shall be mailed within 15 days of the date of service of this order;

(ii) not less than 50% of the total number shall be mailed within 45 days of the date of service of this order; **[36]**

(iii) not less than 75% of the total number shall be mailed within 75 days of the date of service of this order; and

(iv) 100% of the total number shall be mailed within 90 days of the date of service of this order.

(b) With respect to claimants included in paragraphs B(4) and (5) of section IV, whose claims are not included in paragraphs B(1), (2) or (3) of section IV, all materials shall be mailed within fifteen days after receipt by VWoA, the independent and impartial third party administrator, or VWoA's independent distributors of the name and address of the claimant, or sixty days after the date of service of this order, whichever is later.

(2) For the handling of specified claims:

(a) (i) claimants who accept settlement offers shall be sent the applicable monetary amount within forty-five (45) days after the settlement offer acceptance is received by VWoA; **[37]**

(ii) claimants who accept arbitration awards shall be sent the applicable monetary amount within forty-five (45) days after the arbitration award acceptance is received by the independent and impartial third party administrator.

(b) (i) any applicable repair shall be performed within thirty (30) days after the settlement offer acceptance is received by VWoA; (ii) any applicable repair shall be performed within thirty (30) days after the arbitration award acceptance is received by the independent and impartial third party administrator, except as otherwise ordered by the arbitrator for good cause shown.

(c) Claimants who request to participate in the independent and impartial third party arbitration program by returning the "RE-

SPONSE TO VOLKSWAGEN MEDIATION AND ARBITRATION PROGRAM" form included with Attachment E(1) or (2), shall have an arbitration hearing completed within 60 days after the "RESPONSE TO VOLKSWAGEN MEDIATION AND ARBITRATION PROGRAM" form [38] included in Attachment E(1) or (2) is received by VWoA, regardless of whether the claimant requests mediation services.

Provided, however, That delays attributable solely to the claimant shall not be included in the calculation of deadlines. The burden of proving that the delay is attributable solely to the claimant shall be on VWoA;

(3) For claims involving internal engine components that do not involve specified claims:

(a) an arbitration hearing shall be completed within sixty (60) days after the claimant provides the independent and impartial third party administrator with the model, model year, and Vehicle Identification Number of the vehicle and a statement describing the nature of the complaint, regardless of whether the claimant requests mediation services.

Provided, however, That delays attributable solely to the claimant shall not be included in the calculation of deadlines. The burden of proving that the delay is attributable solely to the claimant shall be on VWoA; [39]

(b) (i) (1) claimants who accept settlement offers shall be sent the applicable monetary amount within forty-five (45) days after the settlement offer acceptance is received by VWoA; (2) claimants who accept arbitration awards shall be sent the applicable monetary amount within forty-five (45) days after the arbitration award acceptance is received by the independent and impartial third party administrator; (ii) (1) any applicable repair shall be performed within thirty (30) days after the settlement offer acceptance is received by VWoA; (2) any applicable repair shall be performed within thirty (30) days after the arbitration award acceptance is received by the independent and impartial third party administrator, except as otherwise ordered by the arbitrator for good cause shown. [40]

D. Claimants with specified claims may not be required to fill out any other form to request an arbitration hearing once they have checked Choice 2 or 3 on the form included with Attachment E (1) or Choice 1 or 2 on the form included with Attachment E (2).

E. VWoA may not request a claimant who accepts an offer to settle a specified claim to execute a statement releasing VWoA from further liability if the statement purports to release VWoA from liability that, at the time the claim was settled, would not have been subject to arbitration as described in sections III and IV.

F. Within thirty (30) days of service of this order, VWoA shall provide to its independent distributors and appropriate employees of VWoA, including employees who have responsibility for receiving and responding to consumer complaints, written instructions stating that all consumers who make a specified claim in any oral or written communication received after the date of service of this order must be sent, by first-class mail, a letter providing the documents specified in paragraph B of section IV, above, within fifteen days, or sixty days after the date of service of this order, whichever is later. **[41]**

G. VWoA may make an immediate binding settlement of a specified claim prior to the initiation of mediation or arbitration, *provided that*, prior to the settlement, the claimant received all of the materials required to be sent to the claimant pursuant to paragraph B of section IV (either Attachments E (1) or E (2) (Cover letter) and Attachments A (or A100, as applicable), B (or B100, as applicable) (Background Statements), and F (BBB specified claim brochure)).

H. All envelopes sent pursuant to paragraph B of section IV shall bear no marking, other than the name and address of VWoA and the addressee, and the words "IMPORTANT REIMBURSEMENT INFORMATION" disclosed conspicuously on the front.

I. VWoA shall offer to each claimant at the outset of each arbitration hearing all of the materials required to be sent to the claimant pursuant to paragraph B of section IV (either Attachments E (1) or E (2) (Cover letter) and Attachments A(or A100, as applicable), B(or B100, as applicable) (Background Statements), and F (BBB specified claim brochure)). **[42]**

J. VWoA shall obtain, maintain, and retain for a period of three (3) years from the date of resolution of each claim, records sufficient to show to the satisfaction of designated representatives of the Federal Trade Commission:

(1) For each specified claim:

(a) the following dates as applicable:

(i) the date VWoA received the claimant's name and address, if the specified claim was received by VWoA pursuant to paragraph B (4) and B (5) of section IV.

(ii) the date the materials described in paragraph B of section IV were mailed;

(iii) the date each written response was received by VWoA from the addressee of Attachment E(1) or E(2);

(iv) the date an arbitration hearing was scheduled;

(v) the date the arbitration hearing was completed; [43]

(vi) the date the arbitrator's decision was received by the independent and impartial third-party administrator;

(vii) the date(s) VWoA made each offer to settle the claim;

(viii) the date the claimant accepted or rejected each settlement offer;

(ix) the date the claimant accepted or declined the arbitrator's award;

(x) the date a check was sent to satisfy an arbitration award or settlement agreement;

(xi) the date scheduled for any repair offered as a result of an arbitration award or settlement agreement;

(xii) the date any repair offered as a result of an arbitration award or settlement agreement was actually performed.

(b) the following documents and information, as [44] applicable:

(i) the vehicle model;

(ii) the vehicle model year;

(iii) the vehicle identification number;

(iv) a brief description of the alleged problem, including whether the claimant included information suggesting that excessive oil consumption or engine damage due to lack of lubrication might be involved;

(v) the resolution(s) sought by the claimant: repair, cash reimbursement or vehicle repurchase;

(vi) the amount, if any, of cash reimbursement sought;

(vii) the terms of each offer, if any, made by VWoA to settle the claim;

(viii) the response of the claimant to each settlement offer; [45]

(ix) a copy of each arbitrator's decision including the amount of any cash reimbursement;

(x) whether the claimant accepted the arbitrator's award;

(xi) the name and address of each claimant who owned or leased a covered vehicle, and requested to participate in the mediation and arbitration program set forth in sections III and IV, and was refused the opportunity to participate in the mediation and arbitration program;

(xii) the reason(s) each claimant described in paragraph J (1)(b)(xi) of section IV was determined not to have a specified claim;

(xiii) the reason(s) known to VWoA or the independent and impartial third party administrator for the failure to resolve a claim other than by settlement or an arbitration decision; [46]

(xiv) if the claim is settled, whether a third-party mediator actively participated in settlement discussions;

(xv) a copy of the "RESPONSE TO VOLKSWAGEN MEDIATION AND ARBITRATION PROGRAM" form completed by the claimant.

(c) the name and address of each claimant who contacts orally VWoA, the independent and impartial third-party administrator, or VWoA's independent distributors and states facts that suggest that the claimant may have a specified claim.

(2) For each mediation or arbitration of a claim involving an internal engine component:

(a) the following dates, as applicable:

(i) the date VWoA mailed Attachment G, described in paragraph G of section III;

(ii) the date the claimant first contacted the independent and impartial third-party administrator; [47]

(iii) the date the independent and impartial third-party administrator received from the claimant the model, model year, Vehicle Identification Number of the vehicle and a statement describing the nature of the claim;

(iv) the date VWoA was notified by the independent and impartial third-party administrator that a claim involving internal engine components had been lodged;

(v) the date the arbitration agreement was sent to the claimant;

(vi) the date the arbitration agreement was received from the claimant by the independent and impartial third-party administrator;

(vii) the date the initial arbitration hearing was scheduled;

(viii) the date the initial arbitration hearing was completed; [48]

(ix) the date the arbitration decision was mailed to the claimant;

(x) the date the claimant accepted or rejected each settlement offer from VWoA;

(xi) the date the claimant accepted or rejected an arbitration award.

(b) the following information:

(i) the vehicle model;

(ii) the vehicle model year;

(iii) the vehicle identification number;

(iv) a brief description of the problem alleged;

(v) the resolution(s) sought by the claimant: repair, cash reimbursement or vehicle repurchase;

(vi) the amount, if any, of cash reimbursement sought; [49]

(vii) the terms of each offer, if any, by VWoA to settle the claim before the claimant contacted the independent and impartial third-party administrator;

(viii) the terms of each offer, if any, by VWoA to settle the claim after the claimant contacted the independent and impartial third-party administrator;

(ix) the response of the claimant to each settlement offer;

(x) a copy of each arbitrator's decision including the amount of any cash reimbursement;

(xi) whether the claimant accepted or rejected the arbitrator's award;

(xii) the reason(s) for the failure to resolve a claim other than by settlement or an arbitration decision; **[50]**

(xiii) if the claim is settled, whether a third-party mediator actively participated in settlement discussions;

(xiv) a copy of the arbitration agreement;

(xv) the name and address of each claimant, who requested the opportunity to participate in the third-party mediation and arbitration program set forth in sections III and IV, and was refused the opportunity to participate in said mediation and arbitration program;

(xvi) the reasons each claimant specified in paragraph J (2)(b)(xv) was determined not to be eligible to participate in the mediation and arbitration program set forth in sections III and IV.

(3) Computer disks, tapes or other computer-readable media created or maintained by VWoA, on behalf of VWoA, or by the independent and impartial third party administrator that contain any information specified in paragraphs J(1) and J(2) of section IV, and necessary relevant programming and other **[51]** explanatory data sufficient to enable the Federal Trade Commission to read and analyze the data contained on such media.

V.

It is further ordered, That:

A. At least two times, at least one month apart, within 120 days after the date of service of this order, VWoA shall place and cause to be disseminated the advertisement attached as Attachment H(1) in national magazines as full-page advertisements. At least two times, at least one month apart, within 120 days after the date of service of this order, VWoA shall place and cause to be disseminated the advertisement attached as Attachment H(2) in national magazines as full-page advertisements. Each time Attachment H(1) is placed and each time Attachment H(2) is placed, the magazines must have a combined total non-duplicated readership ("net reach") of at least seventy-five million adults as measured by an outside organization generally recognized as competent and experienced in this field and used by VWoA or its advertising agencies for other advertising research. The demographic characteristics for the combined total readership of the magazines selected for **[52]** such advertisements must be generally representative of the demographic characteristics of the population of owners and potential purchasers of Volkswagen vehicles (for Attachment H(1)) and Audi vehicles (for Attachment H(2)).

B. Beginning with the next model year commencing after the date of service of this order, VWoA shall annually include in any edition of each proprietary magazine sent by VWoA to a primary target audience of VWoA's vehicle owners:

(1) the statements set forth in paragraph J of section I set forth clearly and conspicuously; and

(2) a full page reproduction of Attachment H(1) for Volkswagen owners, or Attachment H(2) for Audi owners, as applicable.

C. Within thirty days after the date of service of this order, VWoA shall furnish to each of its dealers three display posters, with the form and content of Attachment I(1) (for Volkswagen dealers) or I(2) (for Audi dealers), each at least 24" × 36". Thereafter, VWoA shall furnish additional copies of these posters upon request by any dealer. **[53]**

D. Beginning with the date of service of this order, and once in each 6-month period thereafter, VWoA shall recommend and urge, in writing, that each dealer shall:

1) place the display poster, described in paragraph C of section V, in conspicuous and accessible locations within:

(a) service waiting areas; and

(b) parts departments; and

(c) service payment areas.

E. (1) Within five (5) days after the date of service of this order, VWoA shall establish and maintain a toll-free telephone system which will elicit information to enable current and former owners and current and former lessees to enter the independent and impartial third-party arbitration programs set forth in sections III and IV. The toll-free telephone system shall have sufficient capacity to enable each call made by owners and lessees to be answered reasonably promptly. Each caller shall be requested to furnish the the following information, **[54]** which shall be documented:

(a) name, address and telephone number of the caller;

(b) model and model year of the vehicle;

(c) nature of the claim, including sufficient information to ascertain whether a specified claim is alleged, and, if so, whether the specified claim includes an allegation of engine damage from lack of lubrication.

(d) the date of the call.

(2) Each caller to the toll-free number described in paragraph E (1) of section V shall also (a) be informed that, if the caller states facts suggesting that a specified claim may be involved, that VWoA will mail a letter describing the third-party arbitration program to the caller; or b) if the caller states no facts suggesting that the claim may be a specified claim, the caller shall be informed of the toll-free telephone number (or "call collect" number, as applicable), of the local office of the independent and impartial third-party administrator. **[55]**

F. Beginning with the next model year commencing after the date of service of this order, VWoA shall include the following information, in a clear and conspicuous manner, in each vehicle owner's manual or warranty booklet (where it shall be itemized in the Table of Contents and Index):

(1) a description of the mediation and arbitration program for internal engine components required by sections III and IV·

(2) an explanation of how the owner or lessee can enter the mediation and arbitration program;

(3) a description of applicable time deadlines as set forth in paragraph C (3) of section IV;

(4) the toll-free telephone number described in paragraph E of section V.

(5) a statement that there is no charge to the consumer for participating in the program, if such is the case, or a statement of any charges to the consumer for participating in the program; and **[56]**

(6) a statement that the arbitration award is binding on VWoA, but is not binding on the consumer, unless the consumer elects to accept the arbitration award.

G. (1) Within 30 days after the date of service of this order, VWoA shall prepare and issue a PSP which includes the following information:

(a) a description of the mediation and arbitration program for internal engine components required by sections III and IV;

(b) an explanation of how the owner or lessee can enter the mediation and arbitration program;

(c) a description of applicable time deadlines as set forth in paragraph C (3) of section IV;

(d) the toll-free telephone number described in paragraph E of section V;

(e) a statement that there is no charge to the consumer for participating in the program, if such is the case, or a statement of any charges to the consumer for participating in the program; and **[57]**

(f) a statement that the arbitration award is binding on VWoA, but is not binding on the consumer, unless the consumer elects to accept the arbitration award.

(2) The PSP referred to in paragraph G (1) of section V shall, during the term of this order, be included with each PSP index ordered.

VI.

It is further ordered, That sections I, II, III, IV, and V of this order shall expire eight years after the date of service hereof; *provided,* that if at any time during which said sections remain in effect, the Commission issues a final trade regulation rule imposing obligations on the automobile industry comparable to those imposed under any such section(s), such section(s) shall terminate upon the effective date of such rule, and, in such event, VWoA shall advise the Commission of its intention to rely upon any such rule as having terminated and superseded such section(s) of this order thirty (30) days in advance of reliance thereon: *provided further,* that if at any time during which such section(s) remain in effect the Commission issues a final guide under Sections 1.5 and 1.6 of the Commission's Rules of Practice **[58]** imposing obligations on the automobile industry comparable to those imposed under any such section(s), then the Commission shall, upon VWoA's motion or upon the Commission's own motion, reopen this proceeding within one hundred twenty (120) days of such motion, and, within a reasonable time thereafter, vacate any such section(s) of this order, unless the Commission finds that such action is not required by changed conditions of law or fact or is not in the public interest; and *provided further,* that nothing herein shall preclude VWoA at any time from moving the Commission to alter, modify, or set aside this order under the Commission's Rules of Practice.

VII.

It is further ordered, That:

A. VWoA shall, within one hundred twenty (120) days after the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

B. VWoA shall, within one hundred twenty (120) days after the implementation of the PSP program described in sections I and II of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which VWoA has complied with sections I and II of this order. **[59]**

C. VWoA shall, upon request of designated representatives of the

Federal Trade Commission, but no more frequently than every one-hundred eighty days, while sections III and IV of this order are in effect, file with the Commission a report compiling and summarizing data describing settlements, mediations, and arbitrations and accompanying deadlines undertaken pursuant to sections III and IV which have occurred since the previous such report had been completed. Such report shall include accurate summaries of the data required to be kept pursuant to paragraph J of section IV. VWoA shall also transmit to the Commission upon request the computer media and explanatory and programming information required by paragraph J(3) of section IV.

D. VWoA shall retain and transmit to the Commission upon reasonable request:

(1) a copy of each PSP Index required by section I, and a copy of each PSP;

(2) a copy of each poster furnished to dealers pursuant to paragraph C of section V. **[60]**

E. VWoA shall, on a bi-annual basis beginning 6 months after the date of service of this order, monitor and document, based on the personal observations of VWoA or independent distributor employees, each dealer's compliance with the items set forth in paragraph H of section I above and paragraph D of section V above, *provided, however,* that VWoA shall not be required to monitor and document the compliance with paragraph H of section I and paragraph D of section V by a dealer if no employee of VWoA or an independent distributor has visited that dealer within the previous six-month-period to review the dealer's sales, service, or customer relations activities.

F. VWoA shall retain records relative to the manner and form of its continuing compliance with sections I, II, III, IV, V and VI for a period of three (3) years, and shall make said records available for inspection upon reasonable notice by the Federal Trade Commission. If copies of any such records are requested, VWoA may, at its option, either make such records available for copying purposes or provide copies at either (1) rates the Commission charges for copies of records released pursuant to the Freedom of Information Act, or (2) VWoA's costs, whichever is lower. **[61]**

G. Upon request by the Federal Trade Commission, VWoA shall obtain and make available to the Federal Trade Commission in the English language within forty-five days after the request any records relevant to paragraph A of section I in the possession of the manufacturer of any vehicles, engines, or transmissions which VWoA imports or distributes; *provided, however,* that submission of such records shall neither constitute nor be deemed an admission by any entity from which they are obtained of *in personam* jurisdiction of the Commission over such entity; *provided further*, that nothing in this section shall be construed to affect the Commission's access to any records, documents, or other information pursuant to compulsory process or other means.

H. VWoA shall take all necessary legal and equitable action to enforce promptly and in good faith its contractual or other rights to obtain records requested by the Federal Trade Commission pursuant to paragraph G of section VII.

I. During the time that sections I, II, III, IV and V remain in effect, VWoA shall notify the Commission prior to any change in VWoA's corporate structure, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order. [**62**]

VIII.

It is further ordered, That the provisions of this order shall be limited in their application to the United States.

IX.

It is further ordered, That the complaint against Volkswagen AG, a corporation, is hereby dismissed.

ATTACHMENT A

BACKGROUND STATEMENT

OIL USAGE

BACKGROUND

This case may involve an owner's complaint about excessive oil use in a gasoline-fueled 1974–1979 [Volkswagen water-cooled engine] [Audi Fox or 5000].

Since 1981, the Federal Trade Commission (FTC) and [Volkswagen (VW)] [Volkswagen of America, the importer of Audi vehicles (Audi)] have been involved in an administrative lawsuit about allegations of excessive oil use in 1974 to 1979 [VW cars with water-cooled gasoline engines] [Audi Fox and 5000 vehicles]. The FTC has alleged that VW failed to tell consumers about an "abnormally high" number of engine problems related to excessive oil consumption in these vehicles. [VW] [Audi] has denied this claim and has stated that it has at all times provided owners with more than sufficient information to operate and maintain their vehicles safely and economically. [VW] [Audi] and the FTC have now agreed to settle this dispute without further litigation.

As part of their settlement of this dispute, [VW] [Audi] and the FTC have agreed to allow such complaints to be submitted to mediation and arbitration. They have prepared this information sheet to give consumers, mediators and arbitrators potentially useful background facts. Some of these facts may not be widely known.

OIL USAGE

Like all automobile engines, the water-cooled engines in 1974–1979 [Volkswagen] [Audi] vehicles use lubricating oil to perform several vital functions. The rate of oil usage may vary widely, generally depending on several factors, including the design of the engine, its age and mechanical condition, the viscosity (or thickness) and quality of oil used, the maintenance and care given to the vehicle and the driving habits of the operator. **[2]**

Internal oil consumption in gasoline-powered automobile engines usually occurs in one or more of three areas: past the "valve stem seals," past the piston rings, or through the "crankcase breather system." Sometimes, internal oil burning is evidenced by smoke coming from the tailpipe, but at other times no smoke is visible. At other times, tailpipe smoke may result from causes unrelated to oil consumption.

Automobile engineers do not agree on what precise rate of oil consumption is acceptable. Usually, however, gasoline automobile engines use slightly more oil during the initial break-in period of 5,000 to 10,000 miles than they will later. Then, until at least 50,000 miles, engines in good condition should have a roughly even rate of oil consumption, which can increase gradually because of normal wear and tear on internal engine parts. A sudden increase in oil consumption, or a substantial increase when the car has been driven less than 50,000 miles, usually means that a component has failed, the operator's driving habits have changed, or that maintenance or care habits have been altered.

In controlled engineering tests conducted by [Volkswagen] [Audi] and others on prototype and production engines and complete vehicles, mechanically sound engines, tested over 50,000 miles or more used one quart or less of oil every 1,000–2,000 miles. Nevertheless, some water-cooled engines in 1974–1979 [VW] [Audi] vehicles have experienced higher rates of oil consumption in actual customer use.

The FTC claims that "high rates of oil consumption" were abnormally frequent in water-cooled gasoline fueled 1974–1979 [VW] [Audi] vehicles and that in cases where substantially increased rates of oil use have occurred at less than 50,000 miles in such vehicles, the most common cause of such increase has been leakage past failed valve stem seals.

[VW] [Audi] denies this claim and states that these vehicles in customer hands have experienced, on a worst case basis, a fleet average oil consumption rate, from whatever causes, of several thousand miles per quart.

In mid-1979, [VW] [Audi] introduced a new valve stem seal using an improved material [in the Fox and 5000]. As is customary, the improved part was used for both original equipment and replacement parts.

The FTC contends that [VW's] [Audi's] 1979 valve stem seal change was made to alleviate the alleged excessive oil consumption in these vehicles. **[3]**

[VW] [Audi] denies that this change was in any way different from the thousands of upgrades and improvements continually made to its vehicles on an ongoing basis.

If increased oil consumption in an individual vehicle does occur past the valve stem seals, replacement of the seals is the appropriate repair. Valve stem seals can be replaced alone. Valve stem seals are also replaced routinely, whenever a cylinder head is replaced or if a "valve job" is performed. Cylinder head replacement and valve jobs are more extensive repairs than valve stem seal replacement, alone. [Volkswagen] [Audi] dealers and independent mechanics have replaced cylinder heads and performed valve jobs in some cases in response to owner complaints of excessive oil usage on 1974–1979 [VW] [Audi Fox and 5000] vehicles.

The FTC claims that excessive oil consumption was abnormally frequent on these vehicles, and most often resulted from failed valve stem seals, and that VW did not inform consumers and dealers of this problem. The FTC also contends that consumers and dealers were not told that valve stem seal replacement, alone, usually corrected the increased oil consumption. The FTC further claims that because mechanics had not been told this information, competent mechanics may have performed cylinder head replacements and valve jobs when valve stem seal replacement, alone, would have corrected the problem.

[VW] [Audi] denies that oil consumption or valve stem seal performance in its engines was in any way abnormal. VW further states that its owner's and service publications have at all times provided customers with specific guidelines for identifying potential problems and dealers with the latest and most cost-effective procedures to diagnose and repair them properly. [VW] [Audi] therefore denies that competent mechanics have ever either misdiagnosed or deliberately overrepaired minor and simple conditions such as valve stem seal replacement, except in isolated cases.

Normally, it is reasonable to expect valve stem seals in a properly maintained and used engine to provide reliable, durable service substantially beyond the warranty period. Claims of oil consumption related to alleged valve stem seal failure most often have occurred, in fact, after the expiration of the warranty. [4]

Proper maintenance and use of a vehicle are important to the durability and reliability of all parts of an automobile engine, including valve stem seals. The manufacturer spells out in the owner's manual recommended maintenance procedures, and discloses driving habits which should be avoided. However, valve stem seals have failed prematurely on some 1974–1979 [VWs] [Audi Foxes and 5000s] even with proper maintenance and use.

[Volkswagen's] [Audi's] limit for maximum permissible oil consumption in these vehicles is [Volkswagen: 2.5 qts./1,000 miles] [Audi: 2.5 qts./1000 miles for the Audi Fox and 2.9 qts./1000 miles for the Audi 5000]. The owner's manuals for 1977–1979 model year water-cooled [VW vehicles stated that "oil consumption can be up to 2.5 U.S. quarts per 1000 miles."] [Audi Fox vehicles stated that "oil consumption can be up to 2.5 qts./1000 miles (2.9 qts./1000 miles for the 5000)." These figures, however, are not a statement of expected normal or average oil consumption in these vehicles.

[VOLKSWAGEN'S] [AUDI'S] WARRANTY

[Volkswagen] [Audi] provides a limited warranty with each new [Volkswagen] [Audi] vehicle sold by one of its dealers. The warranty generally covers any repair and adjustment needed to correct defects in materials and workmanship within the warranty period. However, complaints may occur after the warranty. A manufacturer's warranty is not necessarily the manufacturer's only responsibility, and should not determine the outcome of this case. Likewise, [Volkswagen's] [Audi's] field guide for maximum permissible oil consumption need not dictate the outcome of this case.

ATTACHMENT A100

BACKGROUND STATEMENT

OIL USAGE

BACKGROUND

This case may involve an owner's complaint about excessive oil use in a gasoline-fueled 1974–1977 Audi 100LS vehicle.

Since 1981, the Federal Trade Commission (FTC) and Volkswagen of America, the importer of Audi vehicles, (Audi) have been involved in an administrative lawsuit about allegations of excessive oil use in 1974 to 1979 Audi cars with water-cooled gasoline engines. The FTC has alleged that Audi failed to tell consumers about an "abnormally high" number of engine problems related to excessive oil consumption in these vehicles. Audi has denied this claim and has stated that it has at all times provided owners with more than sufficient information to operate and maintain their vehicles safely and economically. Audi and the FTC have now agreed to settle this dispute without further litigation.

As part of their settlement of this dispute, Audi and the FTC have agreed to allow such complaints to be submitted to mediation and arbitration. They have prepared this information sheet to give consumers, mediators and arbitrators potentially useful background facts. Some of these facts may not be widely known.

OIL USAGE

Like all automobile engines, the water-cooled engines in 1974–1977 Audi 100 vehicles use lubricating oil to perform several vital functions. The rate of oil usage may vary widely, generally depending on several factors, including the design of the engine, its age and mechanical condition, the viscosity (or thickness) and quality of oil used, the maintenance and care given to the vehicle and the driving habits of the operator. [2]

Internal oil consumption in gasoline-powered automobile engines usually occurs in one or more of three areas: past the valve guides and the "valve stem seals," past the piston rings, or through the "crankcase breather system." Sometimes, internal oil burning is evidenced by smoke coming from the tailpipe, but at other times no smoke is visible. At other times, tailpipe smoke may result from causes unrelated to oil consumption.

Automobile engineers do not agree on what precise rate of oil consumption is acceptable. Usually, however, gasoline automobile engines use slightly more oil during the initial break-in period of 5,000 to 10,000 miles than they will later. Then, until at least 50,000 miles, engines in good condition should have a roughly even rate of oil consumption, which can increase gradually because of normal wear and tear on internal engine parts. A sudden increase in oil consumption, or a substantial increase when the car has been driven less than 50,000 miles, usually means that a component has failed, the operator's driving habits have changed, or that maintenance or care habits have been altered.

In controlled engineering tests conducted by Audi and others on prototype and production engines and complete vehicles, mechanically sound engines, tested over 50,000 miles or more used one quart or less of oil every 1,000–2,000 miles. Nevertheless, some water-cooled engines in 1974–1977 Audi 100LS vehicles have experienced higher rates of oil consumption in actual customer use.

The FTC claims that "high rates of oil consumption" were abnormally frequent in water-cooled gasoline fueled 1974–1977 Audi 100LS vehicles, at less than 50,000 miles.

Audi denies this claim and states that these vehicles in customer hands have experienced, on a worst case basis, a fleet average oil consumption rate, from whatever causes, of several thousand miles per quart.

When increased oil consumption occurred in individual Audi 100LS vehicles, various different repair operations were performed depending on the precise cause of the problem and the skill and judgment of the mechanic. These repairs included replacement of the cylinder head, of valve stem seals, of piston rings or a "valve job".

The FTC claims that excessive oil consumption was abnormally frequent on these vehicles and that Audi did not inform consumers and dealers of this problem. The [3] FTC also contends that consumers and dealers were not told that repairs were available to respond to this problem.

Audi denies that oil consumption in Audi 100LS vehicles was in any way abnormal, or that consumers or mechanics required any special information to identify and address any oil usage issues arising with respect to any Audi 100LS vehicle. Audi further states that it has at all times provided specific guidelines for identifying potential problems with the latest and most cost-effective procedures to diagnose and repair them properly.

Proper maintenance and use of a vehicle are important to the durability and reliability of all parts of an automobile engine. The manufacturer spells out in the owner's manual recommended maintenance procedures, and discloses driving habits which should be avoided. However, high rates of oil consumption have been encountered on some 1974–1977 Audi 100LS vehicles even with proper maintenance and use.

Audi's limit for maximum permissible oil consumption in these vehicles is 2.9 qts./1000 miles for the Audi 100LS. The owner's manuals for 1977 model year water-cooled Audi 100LS vehicles stated that "oil consumption can be up to 2.9 qts./1000 miles." This figure, however, is not a statement of expected normal or average oil consumption in these vehicles.

AUDI'S WARRANTY

Audi provides a limited warranty with each new Audi vehicle sold by one of its dealers. The warranty generally covers any repair and adjustment needed to correct defects in materials and workmanship within the warranty period. However, complaints may occur after the warranty. A manufacturer's warranty is not necessarily the manufacturer's only responsibility, and should not determine the outcome of this case. Likewise, Audi's field guide for maximum permissible oil consumption need not dictate the outcome of this case.

ATTACHMENT B

BACKGROUND STATEMENT

ENGINE DAMAGE FROM LACK OF OIL

NOTICE: Please read the attached "Oil Usage" Background Statement, if this case also involves a claim of excessive oil usage or consumption. It may contain useful facts for this case.

BACKGROUND

This case may involve an owner's complaint about engine damage from lack of oil in a gasoline-fueled 1974–1979 [Volkswagen] water-cooled engine] [Audi Fox or 5000].

Since 1981, the Federal Trade Commission (FTC) and [Volkswagen (VW)] [Volkswagen of America, Inc., the importer of Audi vehicles (Audi)] have been involved in an administrative lawsuit which includes allegations of excessive oil consumption and engine damage from lack of oil in 1974 to 1979 [VW cars with water-cooled gasoline engines] [Audi Fox and 5000 vehicles]. The FTC has alleged that [VW] [Audi] failed to tell consumers about an "abnormally high" number of engines damaged from lack of oil in these vehicles. [VW] [Audi] has denied this claim and has stated that it has at all times provided owners with more than sufficient information to operate and maintain their vehicles safely and economically. [VW] [Audi] and the FTC have now agreed to settle this dispute without further litigation.

As part of their settlement of this dispute, [VW] [Audi] and the FTC have agreed to allow such complaints to be submitted to mediation and arbitration. They have prepared this statement and the attached statement to give consumers, mediators and arbitrators potentially useful background facts. Some of these facts may not be widely known.

ENGINE DAMAGE FROM LACK OF OIL

Like other automobile engines, the [Volkswagen water-cooled] [Audi] engine will be severely damaged if it is run without sufficient lubricating oil circulating within the engine. Engine components which can be damaged in this manner include connecting rods, crankshaft, bearings and the engine block itself. [2]

Whether a particular automobile engine is damaged from lack of oil depends on three factors: the engine's rate of oil consumption, its effective crankcase capacity, and the intervals at which its oil level is checked and replenished.

Over the life of the engine (100,000 miles or more), the amount of oil consumed by individual 1974–1979 [VW] [Audi] vehicles has varied widely at various times from less than one quart per 7,500 miles (the oil change interval), to more than one quart per 400 miles ([VW's] [Audi's] maximum usage figure (345 miles for the 5000), which was published in 1977–1979 model year vehicle owner's literature).

[Starting with a full crankcase, Rabbit and Scirocco engines can consume approximately three quarts of oil (Dasher - 2.5 quarts) without checking and refilling the oil before engine damage becomes an immediate risk. The maximum cruising range of these vehicles per tankful of gasoline, based on EPA mileage estimates, is approximately 275 miles.]

[Starting with a full crankcase, the Audi vehicles can consume approximately the following amounts of oil without checking and refilling the oil before engine damage becomes an immediate risk:

Fox	2.5 quarts
5000	4.1 quarts

The approximate maximum distance which these vehicles can be driven per tankful of gasoline, based on EPA mileage estimates, is as follows:

Fox	335 miles
5000 (1978)	290 miles
(1979)	380 miles

During the period 1974–1979 and thereafter, [Volkswagen] [Audi] received reports that a number of engines in its vehicles had been damaged from insufficient oil.

Between 1974 and 1979, [Volkswagen] [Audi] modified the recommendations in its owner's literature that operators of its vehicles check the oil level at periodic intervals as follows:

- 1974–76 owner's manuals stated "the engine oil level should be checked from time to time";
- 1977–78 owner's manuals stated: "make it a habit to have the engine oil level checked with every second fuel filling"; [3]
- 1979 owner's manuals stated: "make it a habit to have the engine oil level checked with every fuel filling";
- 1978–1979 Warranty and Maintenance booklets repeated the above advice on oil checking intervals and included statements as to the consequences of lack of sufficient engine oil.

[Volkswagen only: Volkswagen sent a letter to owners of 1975–1979 Rabbits and Sciroccos (Dasher owners did not receive this letter) to remind them to check the oil level with every fuel filling. The letter was sent to owners of standard transmission cars in approximately August 1979 and to owners of automatic transmission cars in approximately June 1980. Dealers were also told in August 1979 to attach a sticker reading "Check Engine Oil" around the fuel filler neck under the gas cap of each vehicle they serviced.]

The FTC claims that the information contained in the owner's manuals, [and] maintenance booklets [.] [, letter to consumers, and sticker] was insufficient to alert owners to the risk of serious engine damage from lack of oil. The FTC says that oil consumption in 1974–1979 water-cooled gasoline engines could unexpectedly increase because of deteriorating valve stem seals, and that [VW] [Audi] did not inform owners of this fact. The FTC also says that such an oil consumption increase, if undetected, could lead to severe engine damage from lack of oil, and the FTC claims that [VW] [Audi] did not tell consumers of these facts as well.

[VW] [Audi] says that the information and recommendations in its owner's literature [and communications] were significantly more detailed than those of any other manufacturer and were more than sufficient to prevent any engine damage. [VW] [Audi] denies that oil consumption or valve stem seal performance in its engines was in any way abnormal. [VW] [Audi] says that lubrication-related engine failures were not caused by oil consumption, but by insufficient oil level maintenance, compounded by a large increase in self-service gas stations in the 1970's.

The oil pressure warning light in automobiles is not specifically designed to measure oil level. Therefore, under some operating conditions, the engine may be damaged from low oil level before the oil pressure drops sufficiently to activate the dashboard light. [4]

During the late 1970's, [Volkswagen] [Audi] received reports that some customers who complained of engine damage from lack of oil may have in fact been relying on their dashboard warning lights, rather than their oil dipsticks, to monitor the crankcase oil levels in their cars.

Prior to 1979, all [VW] [Audi] owner's manuals stated that, if the oil pressure warning light comes on while driving, the driver should stop at once, turn the engine off, check the oil level and replenish, if necessary, and not operate the vehicle if the warning light remains on while the engine is restarted. In the 1979 model year, Volkswagen first included additional language, which had not previously appeared in its owner's manuals. This new language stated specifically that the oil pressure warning light is not an oil level indicator and that the dipstick is the proper means of checking the oil level.

[VOLKSWAGEN'S] [AUDI'S] WARRANTY

[Volkswagen] [Audi] provides a limited warranty with each new [Volkswagen] [Audi] vehicle sold by one of its dealers. The warranty generally covers any repair and adjustment needed to correct defects in materials and workmanship within the warranty period. However, complaints may occur after the warranty, including complaints of engine damage from lack of oil. A manufacturer's warranty is not necessarily the manufacturer's only responsibility, and should not determine the outcome of this case.

ATTACHMENT B100

BACKGROUND STATEMENT

ENGINE DAMAGE FROM LACK OF OIL

NOTICE: Please read the attached "Oil Usage" Background Statement, if this case also involves a claim of excessive oil usage or consumption. It may contain useful facts for this case.

BACKGROUND

This case may involve an owner's complaint about engine damage from lack of oil in a gasoline-fueled 1974–1977 Audi 100LS water-cooled engine.

Since 1981, the Federal Trade Commission (FTC) and Volkswagen of America, the importer of Audi vehicles (Audi) have been involved in an administrative lawsuit which includes allegations of excessive oil consumption and engine damage from lack of oil in 1974 to 1979 Audi cars with water-cooled gasoline engines. The FTC has alleged that Audi failed to tell consumers about an "abnormally high" number of engines damaged from lack of oil in these vehicles. Audi has denied this claim and has stated that it has at all times provided owners with more than sufficient information to operate and maintain their vehicles safely and economically. Audi and the FTC have now agreed to settle this dispute without further litigation.

As part of their settlement of this dispute, Audi and the FTC have agreed to allow such complaints to be submitted to mediation and arbitration. They have prepared this statement and the attached statement to give consumers, mediators and arbitrators potentially useful background facts. Some of these facts may not be widely known.

ENGINE DAMAGE FROM LACK OF OIL

Like other automobile engines, the Audi 100LS engine will be severely damaged if it is run without sufficient lubricating oil circulating within the engine. Engine components which can be damaged in this manner include connecting rods, crankshaft, bearings and the engine block itself. [2]

Whether a particular automobile engine is damaged from lack of oil depends on three factors: the engine's rate of oil consumption, its effective crankcase capacity, and the intervals at which its oil level is checked and replenished.

Over the life of the engine (100,000 miles or more), the amount of oil consumed by individual 1974–1977 Audi 100LS vehicles has varied widely at various times from less than one quart per 7,500 miles (the oil change interval), to more than one quart per 345 miles (Audi's maximum usage figure, which was published in the 1977 model year vehicle owner's literature).

Starting with a full crankcase, the Audi 100LS engine can consume approximately 3.1 quarts of oil without checking and refilling the oil before engine damage becomes an immediate risk. The maximum cruising range of these vehicles per tankful of gasoline, based on EPA mileage estimates, is approximately 350 miles.

During the period 1974–1977 and thereafter, Audi received reports that a number of engines in its vehicles had been damaged from insufficient oil.

Between 1974 and 1977, Audi modified the recommendations in its owner's literature that operators of its vehicles check the oil level at periodic intervals as follows:

- 1974–76 owner's manuals stated "the engine oil level should be checked from time to time";
- 1977 owner's manuals stated: "make it a habit to have the engine oil level checked with every second fuel filling".

The FTC claims that the information contained in the owner's manuals was insufficient to alert owners to the risk of serious engine damage from lack of oil. The FTC says that oil consumption in 1974–1977 Audi 100 LS water-cooled gasoline engines could unexpectedly increase, and that Audi did not inform owners of this fact. The FTC also says that such an oil consumption increase, if undetected, could lead to severe engine damage from lack of oil, and the FTC claims that Audi did not tell consumers of these facts as well.

Audi says that the information and recommendations in its owner's literature were significantly more detailed than those of any other manufacturer and were more than sufficient to prevent any engine damage. Audi denies [3] that oil consumption performance in its engines was in any way abnormal. Audi says that lubrication-related engine failures were not caused by oil consumption, but by insufficient oil level maintenance, compounded by a large increase in self-service gas stations in the 1970's.

The oil pressure warning light in automobiles is not specifically designed to measure oil level. Therefore, under some operating conditions, the engine may be damaged from low oil level before the oil pressure drops sufficiently to activate the dashboard light.

During the late 1970's, Audi received reports that some customers who complained of engine damage from lack of oil may have in fact been relying on their dashboard warning lights, rather than their oil dipsticks, to monitor the crankcase oil levels in their cars.

Prior to 1979, all Audi owner's manuals stated that, if the oil pressure warning light comes on while driving, the driver should stop at once, turn the engine off, check the oil level and replenish, if necessary, and not operate the vehicle if the warning light remains on while the engine is restarted.

AUDI'S WARRANTY

Audi provides a limited warranty with each new Audi vehicle sold by one of its dealers. The warranty generally covers any repair and adjustment needed to correct defects in materials and workmanship within the warranty period. However, complaints may occur after the warranty, including complaints of engine damage from lack of oil. A manufacturer's warranty is not necessarily the manufacturer's only responsibility, and should not determine the outcome of this case.

ATTACHMENT C

SPECIAL MODIFIED RULES FOR THE ARBITRATION OF VOLKSWAGEN AND AUDI INTERNAL ENGINE COMPONENT CLAIMS.

1. DEFINITIONS

A. *"Arbitration"* is a process in which two or more persons agree to let an impartial person or panel decide their dispute. This decision becomes legally binding when the consumer accepts the decision, subject to any state law that may provide a limited right of appeal. You may compel compliance with the decision under any applicable state law.

B. *"You"*, as used in these Rules, means one of the parties involved in the dispute being arbitrated.

C. *"BBB"* means the Better Business Bureau which is administering the Arbitration. *"CBBB"* is the Council of Better Business Bureaus.

D. *"Arbitrator"* refers to the individual or panel selected to conduct your arbitration and make a decision on your dispute.

E. *"Days"*, as referred to in these rules, shall mean calendar days.

F. *"Shall"*, as used in these Rules is mandatory; *"may"* is discretionary.

G. *"Decision"* means the written document signed by the arbitrator and mailed to the consumer.

1) *"Final Decision"* might award a repurchase, a replacement, a reimbursement for past repairs, or nothing at all. In these cases, an Arbitrator has no further authority over the execution of the decision.

2) *"Interim Decision"* - When the decision requires action to be performed, an interim decision may be written. In these cases, Arbitrators maintain continuing authority over the execution of their decisions until the actions are completed to their satisfaction. All decisions directing repairs shall be interim. [2]

H. *"Disputes"* that may be arbitrated under these special rules are limited to disagreements between the manufacturer and a customer involving the claimed failure, malfunction, repair, or replacement of internal engine components in a Volkswagen or Audi vehicle distributed by Volkswagen of America, warranted in writing by Volkswagen of America, or certified by the manufacturer as meeting applicable federal safety and emissions standards. These disputes do not include: 1) reimbursements for such things as loss of wages, business income, depreciation or loss of value, permanent replacement transportation, or any other consequential damages, unless all the parties agree specifically in writing that the arbitrator may consider such an item; 2) claims which exceed the cash purchase price of the product involved in the dispute, (plus expenses for towing, storage fees, rental car costs, telephone and hotel bills) unless all parties agree specifically in writing that the Arbitrator may consider other costs of purchase; 3) claims involving cars or trucks which are no longer owned or leased by the consumer at the time the claim was referred to the BBB *(if you plan to sell the car before the hearing is held, you must follow the special procedures described in Rule 29)*; 4) claims covered by insurance, punitive damages, or claims for mental anguish or personal injury. Expenses for towing, storage fees, rental car costs, telephone and hotel bills may be included in the claim to be arbitrated. The Arbitrator has no authority to decide that a party or parties violated any law or to consider matters which cannot be arbitrated under the law. In making any award for reimbursement, repair or repurchase, the Arbitrator may consider requests for deductions based on such factors as owner usage, mileage, overall condition of the product and optional equipment. The decision as to whether your dispute or any part of your dispute is arbitrable under these rules, or is within the scope of your "Agreement to Arbitrate" rests with either

BBB and CBBB, subject to the terms of the agreement between Volkswagen and the FTC under which this program is being conducted.

I. *"Internal Engine Components"* means all gasoline and diesel engine parts, components, and subassemblies included within the complete short block and cylinder head assemblies, including short blocks and cylinder heads, camshafts, valve train components, timing gears, flywheels, pistons, piston rings, crankshafts, connecting rods, and bearings, oil pumps, and associated fasteners, seals and gaskets. [3]

2. APPLICATION OF THESE RULES

These special rules apply to any dispute described under the definition of "Disputes" which you agree to arbitrate through the BBB. You must accept these rules when you sign the "Agreement to Arbitrate" form.

3. THE LEGAL BASIS FOR BBB AUTO LINE

BBB AUTO LINE is an informal forum based on the United States Arbitration Act, 9 U.S.C. 1-14, and administered under procedures consistent with state law. The BBB at all times reserves the right to discontinue administration of arbitration for any case(s) due to a conflict with any state or federal law or regulation.

To the extent that any party wants to challenge or enforce an Arbitrator's decision, a court of competent jurisdiction shall be the proper forum. The BBB accepts no responsibility for costs incurred by either party in challenging or enforcing any decision.

4. AGREEMENT TO ARBITRATE

The BBB shall prepare an Agreement to Arbitrate, briefly describing the "nature of the dispute" and "decision sought" as viewed by you and any other party.

This Agreement to Arbitrate is intended to be a general outline of the dispute and is not an argument of your case.

If you agree with the general description of your side of the dispute and the decision you seek, sign the Agreement to Arbitrate and return it to the BBB within five (5) days of receiving it. If you disagree with the general description of your case, contact the BBB at once. You should not contact the BBB if you think the description of the other party's case is in error; that is an issue for your Arbitrator to decide.

5. SELECTING YOUR ARBITRATOR

The BBB will maintain a pool of individuals who have volunteered to serve, at no pay, as Arbitrators in this program. These volunteers have been trained to conduct a hearing and make a decision in accordance with these rules; but they do not necessarily have mechanical or legal expertise. Arbitrators will be selected from this pool in the following way:

The BBB will provide the customer with a list of Arbitrators chosen from the volunteer pool, together with brief biographies of each. After receiving this list, the [4] customer will have five days to cross off any name with whom a financial, competitive, professional or social relationship exists and assign priorities to those remaining (#1, #2, #3, etc.). If you do not return the list within five days the BBB will assume all names are satisfactory to you and assign one of the Arbitrators on your list to hear your case.

This selection process may take place in a phone call from the BBB to the consumer, unless the consumer requests that the procedure prescribed in the preceding paragraph be used instead. If by telephone, the BBB will read the names and biographies of a list of volunteer Arbitrators, check for potential conflicts of interest and the customer will then assign priorities to the list of volunteer Arbitrators.

Whether the selection process is conducted by telephone or in writing, every effort will be made to provide the customer with the highest choice available. Once an Arbitrator selected has been confirmed with the parties, any substitute must either be approved by the customer or the selection process must be conducted again.

The BBB may use variations of this selection process; however, any alternative procedure shall be designed to avoid any conflict of interest, provide the customer a selection and be approved by the CBBB. VWoA will take no part in the selection of the Arbitrator.

6. COMMUNICATING WITH THE ARBITRATOR

You or anyone representing you shall not communicate in any way with the Arbitrator about your dispute except at the inspection or hearing where the other party has received notice, or unless all other parties are present or have given us their written permission. All other communications about your case with the Arbitrator must be sent through the BBB, which must share them with the other parties. Any communications with the Arbitrator not directed through the BBB will be a violation of this rule and your case may be discontinued.

7. QUALIFYING THE ARBITRATOR

The Arbitrator shall sign a special oath, pledging to make an unbiased decision in your dispute.

If a financial, competitive, professional, family or social relationship exists and no impartial decision is possible, the Arbitrator shall refuse to serve. Even if the Arbitrator believes the relationship is so minor as to have no effect on the decision, it shall be revealed to everyone; and you may decide [**5**] against this Arbitrator serving in your case. The BBB reserves the right to reject any Arbitrator for any conflict which it believes will affect the program's credibility.

8. YOUR REPRESENTATIVE

In any arbitration procedure, you may present your own case or have someone represent you. If your representative is a lawyer, you must give the lawyer's name and address to the BBB at least eight (8) days before the hearing. The BBB will notify the other parties so they have an opportunity to obtain a lawyer if they want. Your failure to give the BBB advance notice may result in a rescheduling of your hearing. You are responsible for any fees charged by your representatives.

9. INSPECTION BY THE ARBITRATOR

You or the Arbitrator may request an inspection of the product or service involved in your dispute. The BBB will *always* schedule an inspection when a consumer seeks a repurchase or replacement of their vehicle, unless all parties agree in writing that such an inspection is not necessary. If possible, the inspection will be performed as part of the hearing, otherwise, the inspection will be scheduled for a later date and all parties will receive at least eight (8) days notice unless waived by all parties.

If the BBB has scheduled an inspection and the vehicle is not available, no decision shall be made in your case.

10. TECHNICAL ADVISERS

At the request of the Arbitrator, the BBB will make every effort to obtain a neutral technical adviser to inspect your car. At the BBB's option, the adviser's findings will be presented in writing or in person either before, during, or after the hearing. In any case, you will have an opportunity to evaluate and comment on the qualifications and findings of the adviser. You also have the right to get your own technical adviser to serve as your witness at your own expense.

11. HEARING NOTICE

The BBB will set a time (during normal business hours) and place for your arbitration hearing, with due regard for your convenience, and that of the Arbitrator, and will notify you *in writing at least eight (8) days in advance of the hearing.* Contact the BBB at once if you cannot attend. If you object to the time or place stated in your notice, contact the BBB immediately and let them know. If you do not object or if you attend the hearing, your acceptance of the notice will be assumed. If our offices are very far from your home, we will [6] arrange for a hearing facility as close to your home as is reasonably possible.

12. WRITTEN OR TELEPHONE HEARINGS

Although most arbitrations involve in-person hearings, the BBB, at your request, may arrange to have your statement and evidence presented by telephone or in writing. If you appear in person, Volkswagen may present its case in person, by telephone, or in writing. If you present your case by telephone, Volkswagen may present its case by telephone or in writing. If you present your case in writing, Volkswagen must also present its case in writing. You always have the right to be present at your arbitration hearing. You also have the right to review and respond to any information submitted by Volkswagen.

13. ATTENDANCE AT HEARINGS

The BBB has the option to arrange for volunteers from our pool of Arbitrators or for governmental representatives to attend arbitration hearings.

For any other observer to attend a hearing, the BBB will first determine that reasonable accommodations exist and then make sure that neither the customer nor the Arbitrator objects to the presence of an observer. If there is room and no objection, the observer shall be subject to the BBB's directions regarding proper conduct.

14. MEDIA PRESENCE IN THE HEARING

Media shall be permitted access to arbitration hearings on the same basis as other observers. *Unless there is approval of all parties and the Arbitrator*, neither media representatives nor any other observer may be permitted to bring cameras, lights, recording, or any other equipment into the hearing. Under these circumstances, all observers, including media representatives, shall be limited to *note* taking, and shall be subject to the BBB's directions regarding observers' proper conduct that will not affect your right to present your case.

15. YOUR ABSENCE FROM THE HEARING

If you do not attend a hearing after receiving proper notice from the BBB, the Arbitrator may decide to go ahead with the hearing in your absence. Your absence does *not* mean an automatic decision against you, and you shall be given an opportunity to present your case in a time and manner set by the Arbitrator. If you *then* fail to present your case, the Arbitrator may make a decision without your presentation. [7]

16. RECORD OF HEARING

The BBB will maintain basic file information on your arbitration hearing, such as the witnesses' names and documents presented as evidence at the hearing. Copies of this and other official arbitration forms relating to your case will be given to you on request. A reasonable copying fee may be charged.

If you give the BBB at least 5 days advance notice, the BBB will arrange for a court reporter at your expense or will audio tape your hearing and, for reasonable copying and transmittal costs, give you a copy. Copies shall also be given to other parties and to the Arbitrator *at your expense.* The Arbitrator may request the BBB tape a hearing at any time.

All taping or other records of an arbitration hearing are the BBB's sole responsibility and no other person shall make such a record at any time.

17. INTERPRETERS

If you need an interpreter for your arbitration and can not provide your own, contact the BBB and it will make every effort to find a volunteer interpreter.

18. OATH OF PARTICIPANTS

You and your witnesses shall be placed under oath at the hearing.

19. HEARING PROCEDURES

The Arbitrator will decide on the order and procedures for you to present your side of the dispute. You will be given an opportunity to make a personal presentation of your case, as well as present any witnesses and evidence in support of your case. You may also question the other parties, their witnesses and their evidence. After everyone has given their presentation, you will be given an opportunity to make a closing statement. When the Arbitrator is satisfied that all testimony and evidence have been presented, your hearing will be closed. If you prepare any part of your case in writing for the arbitration, the other party will have an opportunity to see your statement and submit a response to the BBB which will forward both statements to the Arbitrator.

20. ADMISSION OF EVIDENCE AT THE HEARING

Legal rules of evidence do not apply to an arbitration. However, you should be sure your evidence is true and relevant to your case. [8]

The Arbitrator can limit your presentation if it is repetitious or irrelevant.

21. ABSENTEE STATEMENTS

If you have a witness who cannot attend the hearing, you may present that person's written statement to the Arbitrator. You must make a copy for the other party to read and use for response. Before the Arbitrator makes a decision, you may ask the Arbitrator to give you a reasonable number of days to respond to a written statement presented by the other party, and the Arbitrator may grant that request at his discretion.

22. SUBPOENA POWERS

If you have a reason to believe the other side will not present certain witnesses or evidence which you consider important to a full and fair consideration or dispute, you may send the BBB a request that the Arbitrator subpoena these witnesses or evidence. If the Arbitrator agrees with your request, a subpoena will be sent according to state law.

23. POST-HEARING ADMISSION OF EVIDENCE

Prior to a decision, an Arbitrator may schedule new or additional hearings or otherwise request or allow new or additional evidence in order to get all possible facts relating to your dispute.

Before a decision is made, you may send the BBB new information that was impossible to present at your original hearing and request that it be considered. The BBB will share it with the other parties for their response and forward it to the Arbitrator. After the Arbitrator has made a decision in your case, no more arguments or evidence may be presented, even if newly discovered or not available at the time of the hearing.

24. SETTLEMENT

If you and the other parties voluntarily decide to settle your dispute before the hearing, the settlement will end your dispute and no hearing will be held. You should be sure you are satisfied with the settlement. If Volkswagen agrees to pay you money as part of a voluntary settlement, it must send you a check within 45 days; any repair agreed to under a voluntary settlement must be completed within 30 days. Be sure to let the BBB know about it so the BBB can verify it was done within the time promised. If your voluntary settlement occurs during the hearing, the Arbitrator shall include the settlement in the final decision. If your settlement occurs after the hearing but before [9] the Arbitrator's final decision, be sure to notify the BBB at once.

25. TIME LIMITS

The BBB shall complete an arbitration hearing within 60 days after receipt of "all information" necessary for the BBB to process your complaint, regardless of whether you try mediation first. (For automotive complaints, "all information" is the make, model, year, vehicle identification number, description of the problem, and your requested solution to the problem). These time deadlines may only be extended for delays caused by you.

26. THE DECISION

A. *Time*

The Arbitrator will forward to the BBB a final decision, or an interim decision where appropriate, within ten (10) days of closing your hearing. In cases where an interim decision has been rendered, and the consumer notifies BBB that the repair ordered in the interim decision was not performed or was performed unsatisfactorily, the Arbitrator will have 30 days from the date the consumer notifies the BBB of that fact to forward a final decision. Upon the Arbitrator's request, the BBB may extend this time for special circumstances.

If you have been asked or allowed by the Arbitrator to furnish additional evidence in support of your case, the Arbitrator will set a time for you to send it to the BBB which shall seek a response to your evidence from the other party and send everything to the Arbitrator. Receipt of these additional materials by the Arbitrator shall signal the start of the ten-day decision period. The BBB will mail you a copy of the Arbitrator's decision but will not read a decision to you over the telephone.

B. *Scope*

A decision shall be one that:

1) the Arbitrator considers fair; and
2) falls within the scope of your "Agreement to Arbitrate".

The decision may order an action to be performed, money to be paid, or any combination of these remedies. It may give you all or part of what you seek. Or it may be a decision in which the Arbitrator feels fairness requires no payment or performance at all. [**10**]

C. *Clarifying or Correcting the Decision*

If you do not understand what the Arbitrator has written, you should immediately inform the BBB in writing to request clarification. If you believe the decision contains a mistake of fact, a miscalculation of figures, or exceeds the Arbitrator's authority, inform the BBB in writing of your position immediately.

A "mistake of fact" is not a conclusion of the Arbitrator with which you disagree; it is a true error in such things as a date, time, place, or name, and may only justify a clarification or correction if it concerns the essence of the decision.

A "miscalculation of figures" is not a dollar figure you consider to be unfair; it is an arithmetic error. The "Arbitrator's authority" is limited to the scope of the Agreement to Arbitrate.

The BBB will not accept a clarification or correction request attempting to reargue your case, or based upon your disagreement or disappointment with the decision. If your written statement to the BBB is a valid request for clarification or correction of the decision, the BBB will share your position with the other party, solicit their views and send it to the Arbitrator, who may accept it in whole, in part, or reject it altogether. The Arbitrator may only clarify the intent or correct mistakes in the original decision, *not* change the substance of that decision.

D. *Decision is Impossible to Perform*

If you believe you cannot perform the Arbitrator's decision within the established time limit or at all, this should be put in writing at once and sent to the BBB. We shall handle your submission in the same manner as a request for correction or clarification. The Arbitrator may request additional evidence, may request another hearing, or may do anything necessary to confirm or deny your allegation of impossibility of performance. If the CBBB confirms such impossibility the original decision may then be changed.

If the manufacturer has exceeded the time for performance specified in the Decision, notify the BBB in writing. The BBB will immediately contact the manufacturer and Arbitrator. If the Arbitrator determines that the manufacturer is performing in good faith and that the delay is reasonable, the manufacturer's time performance may be extended. If the consumer contests this determination, they are free to go to court to challenge or confirm the award. [11]

E. *Suspending the Time to Perform*

If you submit to the BBB a written statement to the BBB relating to correction, clarification, or impossibility to perform the decision, the time for acceptance and performance of a decision shall be suspended until the issue is resolved by the Arbitrator or by the BBB.

F. *Reasons for Decision*

An Arbitrator shall include reasons for a decision, either in the decision or in an accompanying form, and the BBB will forward the reasons to all parties along with the decision.

Your written request for clarification or correction of a decision may not be based upon the reasons for the decision, but must be based on the decision alone.

G. *Acceptance or Rejection of the Decision*

The BBB will send the Arbitrator's decision to you, the consumer, for acceptance or rejection. If you accept the decision, Volkswagen will be legally bound to abide by the decision. If Volkswagen is ordered to pay you money, it must send you a check within 45 days; any repair that is ordered must be completed within 30 days except that the Arbitrator may modify the deadline for repair for good cause shown at the hearing.

You, too, will be legally bound, which means you give up any right to sue Volkswagen in court on any claim that fails within the scope of your arbitration, unless Volkswagen fails to perform according to the Arbitrator's decision. (If this should happen, first notify the BBB; however, you may legally enforce the decision or pursue other legal remedies under state or federal law should such a failure occur.)

If you reject the decision: you may pursue other legal remedies under state or federal law; Volkswagen will not be obligated to perform any part of the decision; and depending on federal or state law the decision may be introduced as evidence by you or Volkswagen in any civil court action relating to any matter considered in your arbitration hearing. [12]

NOTE: Your failure to accept or reject the decision within 14 days will be considered a rejection.

H. *Confidentiality of Proceedings*

It is BBB policy that the mediation and arbitration process is private and confidential. The BBB will not release the results of your individual case to the media or any other group or organization. The BBB may release records when all parties agree or when such release is required by law or pertinent to judicial or governmental administrative proceedings. The Federal Trade Commission may also receive records of arbitration proceedings.

I. *Verification of Performance*

If a decision is accepted, Volkswagen must do what the decision requires within the time limits stated. Unless otherwise stated in the decision, the time for performance begins when the BBB received written notice of the acceptance. When this time limit is up, the BBB must contact the consumer within two weeks of when VW was supposed to perform to be sure Volkswagen has performed.

27. FAILURE TO COMPLY WITH RULES

Any failure to follow these rules that may significantly affect the independence, impartiality, fairness or expeditiousness of the mediation or arbitration process should be raised with the Better Business Bureau at the earliest opportunity. Any party raising such objections should attempt to document the specific harm caused by the failure to follow these rules. The BBB may request that you put your objection in writing. If the BBB rules against your objection, it may continue processing your case. If you are not satisfied with the BBB's ruling, you may contact the Federal Trade Commission, Division of Enforcement, Washington, D.C. 20580.

28. INTERPRETATION OF RULES

The BBB will not advise the Arbitrator or make a statement on matters relating to the merits of your case or the reasonableness of the decision. The CBBB will make the decision on procedural questions, the scope of the agreements, and other questions concerning the application and interpretation of these rules, subject to the terms of the agreement between Volkswagen and the Federal Trade Commission under which this program is being conducted. **[13]**

29. SPECIAL REQUIREMENTS IF VEHICLE SOLD BEFORE HEARING

If you decide to sell your vehicle after you file your claim with the BBB, but before the hearing, the following special provisions apply:

A. You must notify Volkswagen at least ten days in advance of the sale that you intend to sell the vehicle;

B. You must give Volkswagen an opportunity to inspect the vehicle before it is sold;

C. If you sell the vehicle before the problem that prompted the claim is repaired, your recovery will be limited to the estimated repair costs (plus expenses for towing, storage fees, rental car costs, telephone and hotel bills);

D. If you arbitrate a claim for an unrepaired problem on a car that you sold, the party that bought the car is not eligible for arbitration for that problem. Likewise, you may not arbitrate a claim for which a previous owner has already accepted an arbitration award.

ATTACHMENT D

SPECIAL MODIFIED RULES FOR THE ARBITRATION OF VOLKSWAGEN AND AUDI OIL RELATED CLAIMS

1. DEFINITIONS

A. *"Arbitration"* is a process in which two or more persons agree to let an impartial person or panel decide their dispute. This decision becomes legally binding when the consumer accepts the decision, subject to any state law that may provide a limited right of appeal. You may compel compliance with the decision under any applicable state law.

B. *"You"*, as used in these Rules, means one of the parties involved in the dispute being arbitrated.

C. *"BBB"* means the Better Business Bureau which is administering the arbitration. *"CBBB"* is the Council of Better Business Bureaus.

D. *"Arbitrator"* refers to the individual or panel selected to conduct your arbitration and make a decision on your dispute.

E. *"Days"*, as referred to in these Rules, shall mean calendar days.

F. *"Shall"*, as used in these Rules is mandatory; *"may"* is discretionary.

G. *"Decision"* means the written document signed by the Arbitrator and mailed to the consumer.

1) *"Final Decision"* might award a repurchase, a replacement, a reimbursement for past repairs, or nothing at all. In these cases, an Arbitrator has no further authority over the execution of the decision.

2) *"Interim Decision"* - When the decision requires action to be performed, an interim decision may be written. In these cases, Arbitrators maintain continuing authority over the execution of their [2] decisions until the actions are completed to their satisfaction. All decisions directing repairs shall be interim.

H. *"Disputes"* that may be arbitrated under these special rules are limited to disagreements between the manufacturer and a customer relating to complaints involving allegations of excessive oil consumption or engine damage due to lack of oil in a 1974–1979 Volkswagen or Audi vehicle with a water-cooled gasoline engine distributed by Volkswagen of America, warranted in writing by Volkswagen of America, or certified by the manufacturer as meeting applicable federal safety and emissions standards. These disputes do not include: 1) reimbursements for such things as loss of wages, business income, depreciation or loss of value, permanent replacement transportation, or any other consequential damages, unless all the parties agree specifically in writing that the arbitrator may consider such an item; 2) claims which exceed the cash purchase price of the product involved in the dispute, (plus expenses for towing, storage fees, rental car costs, telephone and hotel bills) unless all parties agree specifically in writing that the Arbitrator may consider other costs of purchase; 3) claims covered by insurance, punitive damages, or claims for mental anguish or personal injury. The vehicle need not be currently owned or leased by the consumer. Expenses for towing, storage fees, rental car costs, telephone and hotel bills may be included in the claim to be arbitrated. The Arbitrator has no authority to decide that a party or parties violated any law or to consider matters which cannot be arbitrated under the law. In making any award for reimbursement, repair or repurchase, the Arbitrator may consider requests for deductions based on such factors as owner usage, mileage, overall condition of the product and optional equipment. The decision as to whether your dispute or any part of your dispute is arbitrable under these rules, or is within the scope of your "Response to Volkswagen Mediation and Arbitration Program" form, rests with either BBB and CBBB, subject to the terms of the agreement between Volkswagen and the FTC under which this program is being conducted.

2. APPLICATION OF THESE RULES

These special rules apply to any dispute described under the definition of "Disputes" which you agree to arbitrate through the BBB. You must accept these rules when you sign the "Response to Volkswagen Mediation and Arbitration Program" form. [3]

3. THE LEGAL BASIS FOR BBB AUTO LINE

BBB AUTO LINE is an informal forum based on the United States Arbitration Act, 9 U.S.C. 1–14, and administered under procedures consistent with state law. The BBB at all times reserves the right to discontinue administration of arbitration for any case(s) due to a conflict with any state or federal law or regulation.

To the extent that any party wants to challenge or enforce an arbitrator's decision, a court of competent jurisdiction shall be the proper forum. The BBB accepts no responsibility for costs incurred by either party in challenging or enforcing any decision.

4. BEGINNING ARBITRATION

You may complete the "Response to Volkswagen Mediation and Arbitration Program" form and indicate you wish to begin arbitration proceedings immediately; or

You may complete the "Response to Volkswagen Mediation and Arbitration Program" form and indicate you wish to try mediation.

If no settlement is reached, you will be notified of the date of the arbitration hearing at least 8 days in advance of the hearing.

The answers to the questionnaire included with the "Response to Volkswagen Mediation and Arbitration Program" will determine the issues to be arbitrated.

5. SELECTING YOUR ARBITRATOR

The BBB will maintain a pool of individuals who have volunteered to serve, at no pay, as Arbitrators in this program. These volunteers have been trained to conduct a hearing and make a decision in accordance with these rules; but they do not necessarily have mechanical or legal expertise. Arbitrators will be selected from this pool in the following way:

The BBB will provide the customer with a list of Arbitrators chosen from the volunteer pool, together with brief biographies of each. After receiving this list, the customer will have five days to cross off any name with whom a financial, competitive, professional or social relationship exists and assign priorities to those remaining (#1, #2, #3, etc.). If you do not return the list within five days the BBB will assume all names are satisfactory to you and assign one of the Arbitrators on your list to hear your case. [4]

This selection process may take place in a phone call from the BBB to the consumer, unless the consumer requests that the procedure prescribed in the preceding paragraph be used instead. If by telephone, the BBB will read the names and biographies of a list of volunteer Arbitrators, check for potential conflicts of interest and the customer will then assign priorities to the list of volunteer Arbitrators.

Whether the selection process is conducted by telephone or in writing, every effort will be made to provide the customer with the highest choice available. Once an Arbitrator selected has been confirmed with the parties, any substitute must either be approved by the customer or the selection process must be conducted again.

The BBB may use variations of this selection process; however, any alternative procedure shall be designed to avoid any conflict of interest, provide the customer a selection and be approved by the CBBB. VWoA will take no part in the selection of the Arbitrator.

6. COMMUNICATING WITH THE ARBITRATOR

You or anyone representing you shall not communicate in any way with the Arbitrator about your dispute except at the inspection or hearing where the other party has received notice, or unless all other parties are present or have given us their written permission. All other communications about your case with the Arbitrator must be sent through the BBB, which must share them with the other parties. Any communications with the Arbitrator not directed through the BBB will be a violation of this rule and your case may be discontinued.

7. QUALIFYING THE ARBITRATOR

The Arbitrator shall sign a special oath, pledging to make an unbiased decision in your dispute.

If a financial, competitive, professional, family or social relationship exists and no impartial decision is possible, the Arbitrator shall refuse to serve. Even if the Arbitrator believes the relationship is so minor as to have no effect on the decision, it shall be revealed to everyone, and you may decide against this Arbitrator serving in your case. The BBB reserves the right to reject any Arbitrator for any conflict which it believes will affect the program's credibility. [5]

8. YOUR REPRESENTATIVE

In any arbitration procedure, you may present your own case or have someone represent you. If your representative is a lawyer, you must give the lawyer's name and address to the BBB at least eight (8) days before the hearing. The BBB will notify the other parties so they have an opportunity to obtain a lawyer if they want. Your failure to give the BBB advance notice may result in a rescheduling of your hearing. You are responsible for any fees charged by your representatives.

9. INSPECTION BY THE ARBITRATOR

You or the Arbitrator may request an inspection of the product or service involved in your dispute. The BBB will *always* schedule an inspection when a consumer seeks a repurchase or replacement of their vehicle, unless all parties agree in writing that such an inspection is not necessary. If possible, the inspection will be performed as part of the hearing, otherwise, the inspection will be scheduled for a later date and all parties will receive at least eight (8) days notice unless waived by all parties.

If the BBB has scheduled an inspection and the vehicle is not available, no decision shall be made in your case.

10. TECHNICAL ADVISERS

At the request of the Arbitrator, the BBB will make every effort to obtain a neutral technical adviser to inspect your car. At the BBB's option, the adviser's findings will be presented in writing or in person either before, during or after the hearing. In any case, you will have an opportunity to evaluate and comment on the qualifications and findings of the adviser. You also have the right to get your own technical adviser to serve as your witness at your expense.

11. HEARING NOTICE

The BBB will set a time (during normal business hours) and place for your arbitration hearing, with due regard for your convenience and that of the arbitrator, and will notify you *in writing at least eight (8) days in advance of the hearing.* Contact the BBB at once if you cannot attend. If you object to the time or place stated in your notice, contact the BBB immediately and let them know. If you do not object or if you attend the hearing, your acceptance of the notice will be assumed. If our offices are very far from your home, we will arrange for a hearing facility as close to your home as is reasonably possible. **[6]**

12. WRITTEN OR TELEPHONE HEARINGS

Although most arbitrations involve in-person hearings, the BBB, at your request, may arrange to have your statement and evidence presented by telephone or in writing. If you appear in person, Volkswagen may present its case in person, by telephone, or in writing. If you present your case by telephone, Volkswagen may present its case by telephone or in writing. If you present your case in writing, Volkswagen must also present its case in writing. You always have the right to be present at your arbitration hearing. You also have the right to review and respond to any information submitted by Volkswagen.

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If you need an interpreter for your arbitration and can not provide your own, contact the BBB and it will make every effort to find a volunteer interpreter.

18. OATH OF PARTICIPANTS

You and your witnesses shall be placed under oath at the hearing.

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The Arbitrator will decide on the order and procedures for you to present your side of the dispute. You will be given an opportunity to make a personal presentation of your case, as well as present any witnesses and evidence in support of your case. You may also question the other parties, their witnesses and their evidence. After everyone has given their presentation, you will be given an opportunity to make a closing statement. When the Arbitrator is satisfied that all testimony and evidence have been presented, your hearing will be closed. If you prepare any part of your case in writing for the arbitration, the other party will have an opportunity to see your statement and submit a response to the BBB which will forward both statements to the Arbitrator.

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Legal rules of evidence do not apply to an arbitration. However, you should be sure your evidence is true and relevant to your case. [8]

The Arbitrator can limit your presentation if it is repetitious or irrelevant.

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Prior to a decision, an Arbitrator may schedule new or additional hearings or otherwise request or allow new or additional evidence in order to get all possible facts relating to your dispute.

Before a decision is made, you may send the BBB new information that was impossible to present at your original hearing and request that it be considered. The BBB will share it with the other parties for their response and forward it to the Arbitrator. After the Arbitrator has made a decision in your case, no more arguments or evidence may be presented, even if newly discovered or not available at the time of the hearing.

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If you and the other parties voluntarily decide to settle your dispute before the hearing, the settlement will end your dispute and no hearing will be held. You should be sure you are satisfied with the settlement. If Volkswagen agrees to pay you money as part of a voluntary settlement, it must send you a check within 45 days; any repair agreed to under a voluntary settlement must be completed within 30 days. Be sure to let the BBB know about it so the BBB can verify it was done within the time promised. If your voluntary settlement occurs during the hearing, the Arbitrator shall include the settlement in the final decision. If your settlement occurs after the hearing but before [9] the Arbitrator's final decision, be sure to notify the BBB at once.

25. TIME LIMITS

If you contact the BBB or Volkswagen about an oil consumption or engine damage from lack of oil complaint on an eligible 1974–1979 VW or Audi, you will be sent an information packet within fifteen days or before 60 days after the program goes into effect, whichever is later.

After you return the form indicating you wish to participate in the program, an arbitration hearing must be completed within 60 days after Volkswagen receives your form, regardless of whether you try mediation first. This time deadline may only be extended for delays caused by you.

26. THE DECISION

A. *Time*

The Arbitrator will forward to the BBB a final decision, or interim decision where appropriate, within ten (10) days of closing your hearing. In cases where an interim decision has been rendered, and the consumer notifies BBB that the repair ordered was not performed or was performed unsatisfactorily, the Arbitrator will have 30 days from the date the consumer notifies the BBB of that fact to forward a final decision. Upon the Arbitrator's request, the BBB may extend this time for special circumstances.

If you have been asked or allowed by the Arbitrator to furnish additional evidence in support of your case, the Arbitrator will set a time for you to send it to the BBB which shall seek a response to your evidence from the other party and send everything to the Arbitrator. Receipt of these additional materials by the Arbitrator shall signal the start of the ten-day decision period. The BBB will mail you a copy of the Arbitrator's decision but will not read a decision to you over the telephone.

B. *Scope*

A decision shall be one that:

1) the Arbitrator considers fair; and
2) falls within the scope of your "Response to Volkswagen Mediation and Arbitration Program" form. [10]

The decision may order an action to be performed, money to be paid, or any combination of these remedies. It may give you all or part of what you seek. Or it may be a decision in which the Arbitrator feels fairness requires no payment or performance at all.

C. *Clarifying or Correcting the Decision*

If you do not understand what the arbitrator has written, you should immediately inform the BBB in writing to request clarification. If you believe the decision contains a mistake of fact, a miscalculation of figures, or exceeds the arbitrator's authority, inform the BBB in writing of your position immediately.

A "mistake of fact" is not a conclusion of the Arbitrator with which you disagree; it is a true error in such things as a date, time, place, or name, and may only justify a clarification or correction if it concerns the essence of the decision.

A "miscalculation of figures" is not a dollar figure you consider to be unfair; it is an arithmetic error. The "Arbitrator's authority" is limited to the scope of the "Response to Volkswagen Mediation and Arbitration" Form.

The BBB will not accept a clarification or correction request attempting to reargue your case, or based upon your disagreement or disappointment with the decision. If your written statement to the BBB is a valid request for clarification or correction of the decision, the BBB will share your position with the other party, solicit their views and send it to the Arbitrator, who may accept it in whole, in part, or reject it altogether. The Arbitrator may only clarify the intent or correct mistakes in the original decision, *not* change the substance of that decision.

D. *Decision is Impossible to Perform*

If you believe you cannot perform the Arbitrator's decision within the established time limit or at all, this should be put in writing at once and sent to the BBB. We shall handle your submission in the same manner as a request for correction or clarification. The Arbitrator may request additional evidence, may request another hearing, or may do anything necessary to confirm or deny your allegation of impossibility of performance. If the CBBB confirms such impossibility, the original decision may then be changed. [11]

If the manufacturer has exceeded the time for performance specified in the Decision, notify the BBB in writing. The BBB will immediately contact the manufacturer and Arbitrator. If the Arbitrator determines that the manufacturer is performing in good faith and that the delay is reasonable, the manufacturer's time performance may be extended. If the consumer contests this determination, they are free to go to court to challenge or confirm the award.

E. *Suspending the Time to Perform*

If you submit to the BBB a written statement to the BBB relating to correction, clarification, or impossibility to perform the decision, the time for acceptance and performance of a decision shall be suspended until the issue is resolved by the Arbitrator or by the BBB.

F. *Reasons for Decision*

An Arbitrator shall include reasons for a decision, either in the decision or in an accompanying form, and the BBB will forward the reasons to all parties along with the decision.

Your written request for clarification or correction of a decision may not be based upon the reasons for the decision, but must be based on the decision alone.

G. *Acceptance or Rejection of the Decision*

The BBB will send the Arbitrator's decision to you, the consumer, for acceptance or rejection. If you accept the decision:

Volkswagen will be legally bound to abide by the decision; if Volkswagen is ordered to pay you money, it must send you a check within 45 days; any repair that is ordered must be completed within 30 days except that the Arbitrator may modify the deadline for repair for good cause shown at the hearing; and

You, too, will be legally bound, which means you give up any right to sue Volkswagen in court on any claim that falls within the scope of your arbitration, unless Volkswagen fails to perform according to the Arbitrator's decision. (If this should happen, first notify the BBB; however, you may legally enforce the decision or pursue other legal remedies under state or federal law should such a failure occur.) **[12]**

If you reject the decision: you may pursue other legal remedies under state or federal law; Volkswagen will not be obligated to perform any part of the decision; and depending on federal or state law the decision may be introduced as evidence by you or Volkswagen in any civil court action relating to any matter considered in your arbitration hearing.

NOTE: Your failure to accept or reject the decision within 14 days will be considered a rejection.

H. *Confidentiality of Proceedings*

It is BBB policy that the mediation and arbitration process is private and confidential. The BBB will not release the results of your individual case to the media or any other group or organization. The BBB may release records when all parties agree or when such release is required by law or pertinent to judicial or governmental administrative proceedings. The Federal Trade Commission may also receive records of arbitration proceedings.

I. *Verification of Performance*

If a decision is accepted, Volkswagen must do what the decision requires within the time limits stated. Unless otherwise stated in the decision, the time for performance begins when the BBB received written notice of the acceptance. When this time limit is up, the BBB must contact the consumer within two weeks of when VW was supposed to perform to be sure Volkswagen has performed. [13]

27. FAILURE TO COMPLY WITH RULES

Any failure to follow these rules that may significantly affect the independence, impartiality, fairness or expeditiousness of the mediation or arbitration process should be raised with the Better Business Bureau at the earliest opportunity. Any party raising such objections should attempt to document the specific harm caused by the failure to follow these rules. The BBB may request that you put your objections in writing. If the BBB rules against your objections, it may continue processing your case. If you are not satisfied with the BBB's ruling, you may contact the Federal Trade Commission, Division of Enforcement, Washington, D.C. 20580.

28. INTERPRETATION OF RULES

The BBB will not advise the Arbitrator or make a statement on matters relating to the merits of your case or the reasonableness of the decision. The CBBB will make the decision on procedural questions, the scope of the agreements, and other questions concerning the application and interpretation of these rules, subject to the terms of the agreement between Volkswagen and the Federal Trade Commission under which this program is being conducted.

ATTACHMENT E1

[SETTLEMENT OFFER]

Dear [VW] [Audi] owner:

You have expressed concern about unsatisfactory oil consumption or engine damage from lack of oil on your gasoline-fueled [brand, model, model year, with VIN, if known].

We are writing to tell you about a FREE claim settlement program which we are offering to you and other owners who may have experienced these conditions. The program may result in a REFUND, FREE REPAIR, or both. We are offering you this program under a settlement of a lawsuit with the Federal Trade Commission (FTC).

You do not still have to own or lease the car to be eligible. *But, you must fill out the enclosed form to take advantage of this free program.*

Under this program, we can resolve your problem in one of three ways:

1. If you agree, we will settle with you immediately, on the basis of an offer which is attached to this letter and is entitled "Statement of Settlement Offer".
2. If our settlement offer is not acceptable to you, you can use the mediation services of your local BBB office, before proceeding to arbitration.
3. Or, you may want to use the arbitration services of your local BBB, without trying mediation.

If you want to resolve your complaint now, check the first box on the enclosed form. We will settle your claim for the amount stated on the enclosed form. If you accept, you will receive a check within 45 days.

If you want to use the BBB's mediation services before going to arbitration, check the second box on the enclosed form and fill out the brief questionnaire on the back of the form. If mediation efforts are not successful, the BBB will arrange a date for arbitration within 60 days from when we receive this form. If the case is settled, or the arbitrator makes an award in your favor, you will then receive a check within 45 days, or your car will be repaired in most cases, within 30 days.

If you want to use the BBB's arbitration services without trying mediation, check the third box on the enclosed form and [2] fill out the brief questionnaire on the back of the form. The BBB will set an arbitration hearing to be held within 60 days. If the arbitrator makes a decision in your favor, you will receive a check within 45 days, or your car will be repaired in most cases, within 30 days.

If you want to use mediation or arbitration, please include copies of as much documentation as you can with your claim form. This will expedite processing and may help us negotiate a settlement with you directly.

Under the mediation program, a BBB employee will try to help Volkswagen and you to agree on a settlement. With arbitration, a volunteer from the community will conduct an informal hearing where you and VW will present the facts. The volunteer arbitrator will then decide what relief to award you, if any. The arbitrator's decision is legally binding only if you decide to accept it. [A "legally binding" decision means that we must do what the arbitrator says and that you will be unable to pursue your claim in further legal proceedings]. If you reject the decision then you have the option of pursuing further legal proceedings that might be available to you under applicable laws. However, once you have rejected an arbitrator's decision, you will not be able to arbitrate your claim again or to reinstate the arbitrator's award.

We have enclosed a brochure which describes the BBB program and other special provisions in detail.

We also have enclosed "Background Statements," prepared jointly by the FTC and Volkswagen, to give you some useful facts about oil usage and engine damage from lack of oil. You should read these documents carefully before deciding whether to accept our settlement offer described in this letter or preparing your claim for the mediation and arbitration programs. If you take your case to the BBB, you may give the Background Statements to the mediator or arbitrator, or otherwise use them in preparing your arguments.

You are free to accept our offer, to reject it and take your complaint immediately to the Better Business Bureau program for mediation and then arbitration. Or, you can reject our offer and begin the arbitration process immediately, omitting further mediation efforts. Just fill out the enclosed form "Response to Volkswagen Mediation and Arbitration Program" and send it to us in the enclosed postage pre-paid envelope. [3]

We look forward to hearing from you soon.

Sincerely,

Volkswagen of America [4]

[SETTLEMENT OFFER MADE]

RESPONSE TO VOLKSWAGEN MEDIATION AND ARBITRATION PROGRAM

[__] 1. I accept Volkswagen of America's settlement offer in the amount of $__.00. Volkswagen of America will send me a check for this amount within 45 days of receipt of this response. I understand that by accepting this settlement I release Volkswagen [insert language specifying release that comports with Paragraph E of Section IV].

[__] 2. I want to use the BBB mediation and arbitration procedures. I understand that if mediation efforts are not successful, my local BBB will set an arbitration hearing date for less than 60 days after you receive this form. I have also read the enclosed brochure describing the BBB mediation and arbitration program, and the enclosed Background Statement(s).

[__] 3. I want to proceed to an arbitration hearing without using BBB's mediation services first. I understand that my local BBB will set an arbitration date for less than 60 days after you receive this form. I have also read the enclosed brochure describing the BBB mediation and arbitration program, and the enclosed Background Statement(s).

If you checked 2. or 3., please fill out the brief questionnaire on the back of this form. **Be sure to fill out the form carefully. The arbitrator will not be able to decide any issues not set out in the form, and will be able to give you only what you asked for on the form.**

____
Signature

Please print your name, address and telephone number where you can be reached during the day:

NAME:____________________
ADDRESS:____________________
____
CITY: ______ STATE______
ZIP: ____________________
DAYTIME
PHONE ( ) ____________
EVENING
PHONE ( ) ____________ [5]

Be sure to fill out the form carefully, because it will determine what issues the arbitrator can decide.

PLEASE DESCRIBE BRIEFLY THE PROBLEM YOU HAD WITH YOUR CAR:

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____

WHAT IS THE RESOLUTION YOU SEEK?

(The issues which can be arbitrated and the remedies available are explained in the paragraphs entitled "Beginning the AUTO LINE Program" and "The Arbitration Process" which you will find on pages XX and YY of the enclosed "BROCHURE FOR CLAIMANTS DESCRIBING THE AUTO LINE PROGRAM FOR OIL RELATED CLAIMS ON 1974 - 1979 VOLKSWAGEN AND AUDI VEHICLES." The remedies available are governed by Rule 26. B. and Rule 1. H. of the "SPECIAL MODIFIED RULES FOR THE ARBITRATION OF VOLKSWAGEN AND AUDI OIL RELATED CLAIMS." You may request a copy of these rules by calling the company at (800) •••_••••.)

____

WHAT HAS THIS PROBLEM COST YOU?

(Please do not include any costs from loss of business, wages or personal injury.)

Repairs	$______	Telephone calls	$______
Rental Cars	$______	Other direct costs	$______
Towing	$______	(Please specify.)	$______
Storage fees	$______		$______
		TOTAL	$______

(NOTE: The arbitrator will not be allowed to award you more than what you ask for on the claim form.)

DOES THE CAR STILL NEED REPAIRS FOR EXCESSIVE OIL CONSUMPTION OR FOR ENGINE DAMAGE FROM LACK OF OIL? YES __ NO __

IF YOU KNOW WHAT REPAIRS DOES IT NEED? ______________________

____

____

WHAT IS THE APPROXIMATE CURRENT MILEAGE, IF YOU STILL OWN THE CAR? ______________________

VEHICLE IDENTIFICATION NO. (if known): ______________________

MODEL: ______________________ MODEL YEAR ______________________

PLEASE SEND IN COPIES OF ANY RECORDS, IF YOU HAVE THEM, OF THE AMOUNT OF YOUR CLAIM—BILLS, CHECKS, RECEIPTS, ETC. THIS WILL EXPEDITE PROCESSING AND POSSIBLE SETTLEMENT OF YOUR CLAIM.

ATTACHMENT E2

[NO SETTLEMENT OFFER]

Dear [VW] [Audi] owner:

You have expressed concern about unsatisfactory oil consumption or engine damage from lack of oil on your gasoline-fueled [brand, model, model year, with VIN, if known].

We are writing to tell you about a FREE claim settlement program which we are offering to you and other owners who may have experienced these conditions. The program may result in a REFUND, FREE REPAIR, or both. We are offering you this program under a settlement of a lawsuit with the Federal Trade Commission (FTC).

You do not still have to own or lease the car to be eligible. *But, you must fill out the enclosed form to take advantage of this free program.*

Under this program, we can resolve your problem in one of two ways:

1. You can use the mediation services of your local Better Business Bureau (BBB) office, followed by arbitration, if necessary.
2. Or, you may want to use the arbitration services of your local BBB, without trying mediation.

If you want to use the BBB's mediation service before going to arbitration, check the first box on the front of the enclosed form, fill out the brief questionnaire on the back and mail it in. If mediation does not resolve the matter, the BBB will arrange a date for arbitration within 60 days from when we receive this form. If the case is settled, or the arbitrator makes an award in your favor which you accept, you will then receive a check within 45 days, or your car will be repaired in most cases within 30 days.

If you want to use the BBB's arbitration services without trying mediation first, check the second box on the enclosed form, and fill out the brief questionnaire on the back and mail it in. The BBB will set an arbitration hearing to be held within 60 days from when we receive this form. If the arbitrator makes a decision in your favor which you accept, you will receive a check within 45 days, or your car will be repaired in most cases within 30 days after your acceptance is received.

If you want to use mediation or arbitration, please include copies of as much documentation as you can with your claim form. [2] This will expedite processing and may help us to negotiate a settlement with you directly.

Under the mediation program, a BBB employee will try to help Volkswagen and you to agree on a settlement. With arbitration, a volunteer from the community will conduct an informal hearing where you and VW will present the facts. The volunteer arbitrator will then decide what relief to award you, if any. The arbitrator's decision is legally binding only if you decide to accept it. [A "legally binding" decision means that we must do what the arbitrator says and that you will be unable to pursue your claim in further legal proceedings.] If you reject the decision then you have the option of pursuing further legal proceedings that might be available to you under applicable laws. However, once you have rejected an arbitrator's decision, you will not be able to arbitrate your claim again or to reinstate the arbitrator's award.

We have enclosed a brochure which describes the BBB program and other special provisions in detail.

We also have enclosed "Background Statements," prepared jointly by the FTC and Volkswagen, to give you some useful facts about oil usage and engine damage from lack of oil. You should read these documents carefully before preparing your claim for the mediation and arbitration programs. If you take your case to the BBB, you may give the Background Statements to the mediator or arbitrator, or otherwise use them in preparing your arguments.

You are free to take your complaint immediately to the Better Business Bureau program for mediation and then arbitration. Or, you can begin the arbitration process immediately, omitting further mediation efforts. Just fill out the enclosed form "Response to Volkswagen Mediation and Arbitration Program" and send it to us in the enclosed postage pre-paid envelope.

We look forward to hearing from you soon.

Sincerely,

Volkswagen of America [3]

[NO SETTLEMENT OFFER MADE]

RESPONSE TO VOLKSWAGEN MEDIATION AND ARBITRATION PROGRAM

[_] 1. I want to use the BBB mediation and arbitration procedures. I understand that if mediation efforts are not successful, my local BBB will set an arbitration hearing date for less than 60 days after you receive this form. I have also read the enclosed brochure describing the BBB mediation and arbitration program, and the enclosed Background Statement(s).

[_] 2. I want to proceed to an arbitration hearing without using BBB's mediation services first. I understand that my local BBB will set an arbitration date for less than 60 days after you receive this form. I have also read the enclosed brochure describing the BBB mediation and arbitration program, and the enclosed Background Statement(s).

If you checked 1. or 2., please fill out the brief questionnaire on the back of this form. **Be sure to fill out the form carefully. The arbitrator will not be able to decide any issues not set out in the form, and will be able to give you only what you asked for on the form.**

____

Signature

Please print your name, address and telephone number where you can be reached during the day:

NAME: ______________________

ADDRESS: ____________________

____

CITY: ________ STATE ________

ZIP: ________________________

DAYTIME

PHONE (   ) ________________

EVENING

PHONE (   ) ________________

[4]

Be sure to fill out the form carefully, because it will determine what issues the arbitrator can decide.

PLEASE DESCRIBE BRIEFLY THE PROBLEM YOU HAD WITH YOUR CAR:

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WHAT IS THE RESOLUTION YOU SEEK?

(The issues which can be arbitrated and the remedies available are explained in the paragraphs entitled "Beginning the AUTO LINE Program" and "The Arbitration Process" which you will find on pages XX and YY of the enclosed "BROCHURE FOR CLAIMANTS DESCRIBING THE AUTO LINE PROGRAM FOR OIL RELATED

CLAIMS ON 1974 - 1979 VOLKSWAGEN AND AUDI VEHICLES." The remedies available are governed by Rule 26. B and Rule 1. H. of the "SPECIAL MODIFIED RULES FOR THE ARBITRATION OF VOLKSWAGEN AND AUDI OIL RELATED CLAIMS." You may request a copy of these rules by calling the company at (800) ***-****.)

WHAT HAS THIS PROBLEM COST YOU?

(Please do not include any costs from loss of business, wages or personal injury.)

Repairs	$______	Telephone calls	$______
Rental Cars	$______	Other direct costs	$______
Towing	$______	(Please specify.)	$______
Storage fees	$______		$______
		TOTAL	$______

(NOTE: The arbitrator will not be allowed to award you more than what you ask for on the claim form.)

DOES THE CAR STILL NEED REPAIRS FOR EXCESSIVE OIL CONSUMPTION OR FOR ENGINE DAMAGE FROM LACK OF OIL? YES __ NO __

IF YOU KNOW, WHAT REPAIRS DOES IT NEED? ______________________

____

____

WHAT IS THE APPROXIMATE CURRENT MILEAGE, IF YOU STILL OWN THE CAR? ______________________

VEHICLE IDENTIFICATION NO. (if known) ______________________

MODEL: ______________________ MODEL YEAR ______________________

PLEASE SEND IN COPIES OF ANY RECORDS, IF YOU HAVE THEM, OF THE AMOUNT OF YOUR CLAIM—BILLS, CHECKS, RECEIPTS, ETC. THIS WILL EXPEDITE PROCESSING AND POSSIBLE SETTLEMENT OF YOUR CLAIM.

ATTACHMENT F

BROCHURE FOR CLAIMANTS DESCRIBING THE AUTO LINE PROGRAM FOR OIL-RELATED CLAIMS ON 1974 - 1979 VOLKSWAGEN AND AUDI VEHICLES

WHAT IS AUTO LINE?

AUTO LINE is an out-of-court program run by Better Business Bureaus to settle disputes between consumers and certain automobile manufacturers who agree to arbitrate complaints about their products and repairs. It includes a mediation service to settle claims voluntarily.

AUTO LINE is being used to implement a settlement of a 1981 lawsuit between Volkswagen of America and The Federal Trade Commission (FTC). Because some special provisions apply, this brochure only describes the AUTO LINE program for problems involving excessive oil consumption and engine damage from lack of oil in 1974 to 1979 Volkswagen and Audi vehicles equipped with water-cooled, gasoline-powered engines distributed by Volkswagen of America, warranted in writing by Volkswagen of America, or certified by the manufacturer as meeting applicable federal safety and emissions standards. These vehicles were the subject of that lawsuit.

The FTC/Volkswagen/Audi settlement provides that any consumer who has a claim involving one of the oil-related problems noted above may use AUTO LINE to resolve it. This mediation and arbitration process is free of charge to the consumer. If efforts at mediation fail, or if the consumer elects to bypass the mediation phase, the BBB-appointed arbitrator will conduct a fact-finding hearing and make a decision in the matter. If the consumer accepts the decision, Volkswagen must do as the arbitrator directs.

This booklet describes the *BBB Auto Line* program and tells you how to participate in the arbitration process.

To participate in this AUTO LINE program, consumers are not required to presently own or lease their car. Volkswagen and the FTC have agreed that previous owners or consumers who leased these cars may seek to resolve oil problem claims through the AUTO LINE programs. In addition, Volkswagen has agreed with the FTC to use AUTO LINE to resolve any complaint that involves an engine component on one of its previous, current, or future model year vehicles. Also, VW has voluntary programs that [2] provide for arbitrating certain complaints for other parts of the car. However, if the dispute does not concern an oil-related problem with the 1974 to 1979 vehicles noted on page 1, you must write to Volkswagen or call your local Better Business Bureau to receive a different brochure about these programs.

The AUTO LINE Program offers:

- A mediated resolution of the dispute by BBB staff;
- Arbitration of claims if mediation has been unsuccessful or if the consumer elects to bypass mediation;
- A broad-based pool of trained volunteers from the local community who, as neutral arbitrators, decide the case;
- Arbitrators who are chosen by the consumer;
- Procedures that are informal and allow consumers to present their own cases.

Under the AUTO LINE Program:

- Mediation is voluntary;
- The arbitration hearing must be completed within 60 days after the consumer enters the program;
- Consumers can present their case in person, by telephone, or in writing;
- Hearings are private unless the consumer agrees to have public observers;
- An on-site vehicle inspection by an independent technical adviser to the arbitrator is available, if necessary;
- Consumers can pursue other available remedies if they do not accept the arbitrator's decision;
- Mediation and arbitration will be monitored by the Federal Trade Commission.

How Long Does Auto Line Take?

Volkswagen and the FTC have agreed that specific deadlines shall govern the mediation and arbitration process.

- Whether or not you elect to mediate your claim, mediation and the arbitration hearing, if necessary, shall be completed within 60 days from the day Volkswagen receives [3] your request for arbitration and your completed forms. You will be notified in writing at least 8 days in advance of the date scheduled for the arbitration hearing.
- If the arbitrator orders Volkswagen to give you a money settlement, it must be paid within 45 days of the date you accept the decision.
- If the arbitrator orders Volkswagen to repair your car, the repair must be performed within 30 days of the date you accept the arbitrator's decision, unless the

arbitrator shortens or lengthens the deadline for good cause shown. If a repair is ordered, and you notify the BBB that the repair ordered was not performed or was performed unsatisfactorily, the arbitrator will have 30 days from the date you notify the BBB of that fact to forward a final decision.

- These 45- and 30-day deadlines also apply to any settlement you may reach with Volkswagen during the mediation process.

If any of these deadlines are missed, Volkswagen may have violated the agreement between it and the FTC. If this happens, you may inform the FTC (Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Ave., N.W., Washington, D.C. 20580). However, if a delay is caused by you (for example, if you request an extension of time in which to prepare for your hearing or if you ask that the hearing be rescheduled for a later, more convenient date), that time is not counted.

BEGINNING THE AUTO LINE PROGRAM

When you receive the form entitled **"Response to Volkswagen Mediation and Arbitration Program"** from Volkswagen, decide whether you wish to enter the AUTO LINE program. If you have not received **"Response to Volkswagen Mediation and Arbitration Program"** from Volkswagen, contact the company. Volkswagen's toll-free number is (800) 822–8987, or you can write to Volkswagen of America at 888 West Big Beaver Road, Troy, Michigan 48007. Tell Volkswagen your name, address, telephone number, the make and model year of your car, and whether your claim involves oil consumption, engine damage due to lack of oil or both.

When Volkswagen sends you the AUTO LINE program form, it may offer to settle your claim without requiring either mediation or arbitration. You must decide whether to take Volkswagen's initial settlement offer, or to proceed with participation in the arbitration program. [4]

If you decide to enter the *Auto Line* program, complete the form from Volkswagen with as much information as possible and promptly return it to Volkswagen. Try to include the make, model, year and, the Vehicle Identification Number (VIN) of the car, together with a statement describing your problem. These are the most critical pieces of information, but other parts of the form are also important, including what you want VW to do. This must be stated because the arbitrator's decision-making authority is limited to what you write on the form. (For example, if you request a refund of $100, the arbitrator cannot award you more than the amount you have requested.) Remember, also, to enclose *copies* of any documents you have that may help prove your case. If you no longer have copies of repair bills or cancelled checks, you might contact the repair shop or your bank or credit card company for copies.

THE MEDIATION STAGE

If you choose to participate in mediation, the BBB will review your claim and then review the position of Volkswagen. The BBB will try to achieve an informal resolution by serving as an intermediary between you and Volkswagen. If you negotiate a settlement with Volkswagen yourself, let the BBB know, so such a settlement can be verified.

Should the BBB mediation efforts fail, an arbitration hearing will be scheduled automatically within 30 days of Volkswagen's receipt of your request for mediation and arbitration.

If at any time, you decide that you do not want the BBB to continue seeking a mediated settlement of your complaint, or if you prefer not to try mediation, notify the BBB in writing. In either case, the agreement between the FTC and Volkswagen requires that the arbitration hearing be scheduled and held within 60 days of Volkswagen's receipt of your request for mediation or arbitration.

THE ARBITRATION PROCESS

It is important for you to know what issues Volkswagen will arbitrate and those which it need not arbitrate. Volkswagen **must** arbitrate your claims for the cost of completed repairs, of needed repairs and for expenses related to your complaint of oil consumption or engine damage from lack of oil. Such expenses also include the cost of towing, rental cars, telephone calls, storage fees for your car, and hotel bills, and any amount by which you claim that the resale price of your car was reduced because of oil consumption or engine damage which had not been [5] repaired when the car was sold. The maximum amount you may claim is what you paid for the car plus related expenses.

Issues that may **not** be arbitrated in the BBB program include punitive damages, loss of business income, insurance claims, personal injury and property damage claims, and allegations of fraud or other violations of criminal law. Such issues are best dealt with in a court of law, and you are free to pursue such claims outside the context of arbitration.

Who Are The Arbitrators?

Thousands of volunteers from all walks of life serve the BBB as arbitrators—decision makers—in these cases. They include professionals, educators, retirees, lawyers, housewives, and others, who have gone through a special training program. Arbitrators are not employed by the BBB, nor are they paid for their services. They perform this duty as a public service. All arbitrators are required to disclose, as a condition of hearing a case, any financial, commercial, professional, social or familial relationship—no matter how remote—with any of the parties or their counsel. No more than one-third of the arbitrators on the selection list sent to you by the BBB may be persons at a supervisory level in a company that makes, services, or sells a product. In all cases, your dispute will be decided by someone who is completely independent and has no vested interest in the outcome.

Choosing An Arbitrator

Although state law and BBB policies offer various means of choosing arbitrators, normally you will be given a list of trained community volunteers together with a brief biography of each. You will be asked to cross off any arbitrator with whom you may have a business, financial, or social relationship, to select the arbitrator who is your first choice, and to indicate your priority preference ("1", "2," "3," etc.) for the remaining names. Where state law requires it, a panel of three arbitrators may decide your case. VWoA will take no part in the selection of the arbitrator.

After you have returned your arbitrator choices to the BBB, along with an indication of the times when you will *not* be available to attend a hearing, the BBB will tell you when and where the hearing is to be held. If you have chosen to present your case in writing or by telephone, you also must make that choice known to the BBB. [6]

What Does Arbitration Cost?

The agreement between Volkswagen and the FTC requires Volkswagen to pay the costs of AUTO LINE. You will have no costs unless you choose to bring your own paid witnesses or retain an attorney. Copies of records and documents that are a part of the hearing will be available to you at any time for a reasonable cost. Also, if you want a recording of the entire proceedings, you must pay recording expenses.

The Hearing

The actual hearing is an informal session. It is designed to ensure that you and Volkswagen's representative get a full opportunity to describe the dispute to the arbitrator.

Normally, arbitration hearings are held at the BBB during regular working hours; however, the BBB will schedule a time and place convenient to you and to the others involved.

The hearings usually feature in-person presentations, during which each side presents its case to an arbitrator and all have an opportunity to ask questions, including the arbitrator. Most consumers choose to have in-person hearings, and the BBB believes this is the best way of getting all the facts before the arbitrator. However, you also have the option of presenting your case by telephone or in writing.

A Volkswagen representative usually will attend the hearing to present its case. However, Volkswagen, at its option, also may present its case by telephone or mail (if you appear in person), or by mail (if you present your case by telephone). You always may present your case in person, even if Volkswagen does not.

You may be represented by an attorney or other spokesperson, bring witnesses and present documents, bills, and any other information to prove your case. If you are being represented by a lawyer, tell the BBB as soon as possible so that Volkswagen can be given an opportunity to get legal counsel.

At no time may you or your representative, or Volkswagen or its representative contact the arbitrator without the other party being present. All communications relating to the arbitration must be directed through the BBB. It will forward all information and make sure the other side gets copies when necessary. [7]

When Are Inspections And Technical Advisers Involved?

Sometimes the arbitrator will want to see the car or the repair work to get a full understanding of the facts. The BBB will send you a notice of the inspection time and place. You should be present for such an inspection, and you have a right to bring your own expert if you wish. Should the arbitrator request a technical adviser, the BBB will identify experts in the community who have no relationship with any party and are not potential competitors of Volkswagen.

If you no longer own or lease the car for which the claim is made, you will not be penalized in any way because the car is unavailable for inspection.

HOW TO PREPARE FOR ARBITRATION?

Before coming to the hearing, you should prepare an outline of your argument to help you in your presentation. In that way, you won't forget important points in your favor. To assist you in your preparation, a checklist is given at the end of this section.

Also, before coming to the hearing, you should prepare a list of questions you want to ask Volkswagen. A careful reading of the Background Statements provided to you by VW and the FTC with the letter informing you of the program's availability should assist you in your preparation. During the hearing, you can add to your list of questions. Include anything new that occurs to you when you hear what the other side has to say.

After you state the facts as you see them, Volkswagen has a right to ask you questions. After Volkswagen has stated the facts as they see them, you have the same right to ask them questions. To clarify uncertain areas and to gain a fuller understanding of the dispute, the arbitrator also is trained to ask questions.

After each side has presented its case and the questioning is completed, you should be prepared to give a summary of your position. Try to describe the weak points in Volkswagen's case, deal with any questions that have not otherwise been answered, and tell the arbitrator exactly what kind of decision you want and why.

Remember that the sole purpose of the hearing is to allow the arbitrator to gather and sort the facts and thus make a fair decision. You should be prepared to convince the arbitrator that your position is right and that your opponent's is wrong. [8]

A friendly, sincere approach works best. You are there because you and Volkswagen have a disagreement, but keep that disagreement factual and within the bounds of normal courtesy and conventional language. Bombarding an arbitrator with technical jargon will not be productive, nor will rudeness, arguing with the arbitrator, or belittling your opponent. Put yourself in the arbitrator's position—a volunteer whose only purpose is to help you resolve your dispute. Use common sense about how to proceed.

An Arbitration Checklist

Given here is a checklist to help you prepare for your arbitration hearing. Use whatever items are appropriate to your case; some may not apply.

1. Collect and bring to the hearing all available written information relating to the car and your dispute, especially those noted below. Bring original documents, if possible, and copies for the arbitrator and for the Volkswagen representative. If you do not have documents, sometimes you can get copies from your repair shop, bank, or credit card company. Remember that, although documents are helpful, you are still eligible for a hearing even if you do not have them. Documents that might be useful include:

- purchase contract/finance agreements; purchase date, price, etc.;
- vehicle repair, service, or maintenance records;
- warranties or service contracts which may be applicable;
- proof of repair or maintenance payments;
- correspondence between you and the dealer or manufacturer;
- copies of the Background Statements which Volkswagen sent you regarding "Oil Usage" or "Engine Damage From Lack of Oil." You may find these fact sheets useful in preparing your presentation. If you have not received the appropriate Background Statements, be sure to get them before the hearing from Volkswagen or from the FTC. (Federal Trade Commission, Division of Enforcement, 6th and Pennsylvania Ave., N.W., Washington, D.C. 20580)

2. List any witnesses who may have information about your complaint, such as mechanics or sales personnel. Try to contact them, if you want them to testify in person or to submit written information. You are responsible for your [9] witnesses' submission of information. If you want them to testify in person, keep them informed about the time and place of the hearing.

3. List in chronological order the actions you took to resolve this dispute. Clearly state what the problem is, and why you think the company is responsible.

- To whom did you first speak?
- When did this happen?
- What did they tell you, and/or what action did they take?
- Were other business/service persons involved?
  - –Who?
  - –When?
  - –Why?
  - –What did they tell you and/or what action did they take?

  (Written statements or the presence of witnesses are preferable to your statements, if these are important to your case.)

WHAT HAPPENS AFTER THE ARBITRATOR MAKES A DECISION?

The arbitrator may take up to 10 days after the hearing to make a decision. The written decision and the arbitrator's reasons for the judgment will be sent to you. With that decision will be a form which asks you to accept or reject it.

If you accept it, Volkswagen is legally bound to comply. If the arbitrator's decision awards you money, Volkswagen must pay you that amount within 45 days of the date you accept the decision. If the arbitrator orders Volkswagen to repair your car, that repair must be performed within 30 days of the date you accept the arbitrator's decision, unless the arbitrator modifies the deadline for good cause shown. If you notify the BBB that the repair ordered was not performed or was performed unsatisfactorily, the arbitrator will have 30 days from the date you notify the BBB of that fact to forward a final decision.

If you do not think the manufacturer has complied with the decision, you first should contact the BBB or the FTC (Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Ave., N.W., Washington, D.C. 20580 (202) 326-3037). However, you also may take the award to an appropriate court and have it enforced as if it were a judgment or order of the court—without a rehearing of the case.

If either party believes the final decision contains errors of fact or is unclear, the party may petition the BBB to request [10] the arbitrator to modify or clarify the matter. This is done by making a written request to the BBB which, if it finds the request to have merit, will make a copy for the other party's response, and then will send both documents to the arbitrator. The arbitrator's response to such a request is final.

Of course, if you reject the arbitrator's decision, Volkswagen is not obligated to do anything. You then are free to pursue other legal courses of action.

CONFIDENTIALITY OF PROCEEDINGS

It is BBB policy that the mediation and arbitration process is private and confidential. The BBB will not release results of your case to the media or to any other group or organization. It may, however, release records when this is required by law, by the Federal Trade Commission, or by judicial or governmental administrative proceedings. Records are maintained by the BBB to comply with the audit and record-keeping requirements of the FTC, which will monitor this program.

If you have any problems or complaints about the arbitration process, contact the Federal Trade Commission, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Ave., N.W., Washington, D.C. 20580.

ATTACHMENT G

BROCHURE FOR CLAIMANTS DESCRIBING THE AUTO LINE PROGRAM FOR INTERNAL ENGINE COMPONENT CLAIMS ON VOLKSWAGEN AND AUDI VEHICLES

WHAT IS AUTO LINE?

AUTO LINE is an out-of-court program run by Better Business Bureaus to settle disputes between consumers and certain automobile manufacturers who agree to arbitrate complaints about their products and repairs. It includes a mediation service to settle claims voluntarily.

AUTO LINE is being used to implement a settlement of a 1981 lawsuit between Volkswagen of America and The Federal Trade Commission (FTC). As part of that settlement, Volkswagen will mediate and arbitrate consumer complaints involving the failure, malfunction, repair or replacement of internal engine components on any Volkswagen of Audi vehicle, regardless of model year distributed by Volkswagen of America, warranted in writing by Volkswagen of America, or certified by the manufacturer as meeting applicable federal safety and emissions standards. The engine components subject to the AUTO LINE program consist of all gasoline and diesel engine parts, components, and subassemblies included within the complete short block and cylinder head assemblies, including the short block and cylinder head, camshafts, valve train components, timing gears, flywheels, pistons, piston rings, crankshafts, connecting rods, and bearings, oil pumps, and associated fasteners, seals and gaskets. Because some special provisions apply, this brochure only describes the AUTO LINE program for problems involving engine components on Volkswagen and Audi vehicles.

The FTC/Volkswagen/Audi settlement provides that anyone who owns or leases one of those vehicles at the time the claim is referred to the BBB who has a claim involving one or more of the engine components noted above may use AUTO LINE to resolve it. **If the consumer sells the car before the hearing, though, some special procedures must be followed. SEE page 7 for these important instructions.** This mediation and arbitration process is free of charge to the consumer. If efforts at mediation fail, or if the consumer elects to bypass the mediation phase, the BBB-appointed arbitrator will conduct a fact-finding hearing and make a decision in the matter. If the consumer accepts the decision, Volkswagen must do as the arbitrator directs. This booklet [2] describes the BBB AUTO LINE program and tells you how to participate in the arbitration process.

In addition, Volkswagen has agreed with the FTC to use AUTO LINE to resolve problems involving excessive oil consumption and engine damage due to lack of oil in 1974–1979 Volkswagen and Audi vehicles equipped with water-cooled, gasoline-powered engines. Also, VW has a voluntary program to arbitrate certain complaints for other parts of the car. If your dispute concerns an oil-related problem with the 1974 to 1979 vehicles or a problem with another component (such as the brakes), you must write to Volkswagen or call your local Better Business Bureau to receive a different brochure about these programs.

The AUTO LINE Program offers:

- A mediated resolution of the dispute by BBB staff;
- Arbitration of claims if mediation has been unsuccessful or if the consumer elects to bypass mediation;
- A broad-based pool of trained volunteers from the local community who, as neutral arbitrators, decide the case;
- Arbitrators who are chosen by the consumer;
- Procedures that are informal and allow consumers to present their own cases.

Under the AUTO LINE Program:

- Mediation is voluntary;
- The arbitration hearing must be completed within 60 days after the consumer enters the program;
- Consumers can present their case in person, by telephone, or in writing;
- Hearings are private unless the consumer agrees to have public observers;
- An on-site vehicle inspection by an independent technical adviser to the arbitrator is available, if necessary;
- Consumers can pursue other available remedies if they do not accept the arbitrator's decision;
- Mediation and arbitration will be monitored by the Federal Trade Commission. [3]

How Long Does Auto Line Take?

Volkswagen and the FTC have agreed that specific deadlines shall govern the mediation and arbitration process.

- If you elect to mediate your claim, mediation and arbitration, if necessary, shall be completed within 60 days from the day the BBB receives information stating your model, model year, Vehicle Identification Number and a statement describing the nature of your complaint.

- If the arbitrator orders Volkswagen to give you a money settlement, it must be paid within 45 days of the date you accept the decision.
- If the arbitrator orders Volkswagen to repair your car, the repair must be performed within 30 days of the date you accept the arbitrator's decision, except that the 30 day deadline for repair can be shortened or lengthened at the hearing for good cause shown. If a repair is ordered, and you notify the BBB that the repair ordered was not performed or was performed unsatisfactorily, the arbitrator will have 30 days from the date you notify the BBB of that fact to forward a final decision.
- These 45- and 30-day deadlines also apply to any settlement you may reach with Volkswagen during the mediation process.

If any of these deadlines are missed, Volkswagen may have violated the agreement between it and the FTC. If this happens, you may inform the FTC (Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Ave., N.W., Washington, D.C. 20580). However, if a delay is caused by you (for example, if you request an extension of time in which to prepare for your hearing or if you ask that the hearing be rescheduled for a later, more convenient date), that time is not counted.

BEGINNING THE AUTO LINE PROGRAM

To enter the AUTO LINE program you must obtain the form entitled "*Agreement to Arbitrate*" from the BBB. To obtain the "*Agreement to Arbitrate* from the BBB, call the BBB's toll-free number, (800–)_____ _____, or write to the BBB at ____________ ____________. Tell the BBB your name, address, telephone number, the make and model year of your car, and whether your claim involves an engine component.

If you wish to enter the AUTO LINE program, complete the BBB form with as much information as possible and promptly return it [4] to the BBB. Try to include the make, model, year and, the Vehicle Identification Number (VIN) of the car, together with a statement describing your problem. These are the most critical pieces of information, but other parts of the form are also important, including what you want VW to do This must be stated because the arbitrator's authority is limited to what you write on the form. (For example, if you request a refund of $100, the arbitrator cannot award you more than the amount you have requested.) Remember, also, to enclose *copies* of any documents you have that may help prove your case. If you no longer have copies of repair bills or cancelled checks, you might contact the repair shop or your bank or credit card company for copies.

THE MEDIATION STAGE

If you choose to participate in mediation, the BBB will review your claim and then review the position of Volkswagen. The BBB will try to achieve an informal resolution by serving as an intermediary between you and Volkswagen. If you negotiate a settlement with Volkswagen yourself, let the BBB know, so such a settlement can be verified.

Should the BBB mediation efforts fail, an arbitration hearing will be scheduled automatically.

If at any time, you decide that you do not want the BBB to continue seeking a mediated settlement of your complaint, or if you prefer not to try mediation, notify the BBB in writing. In either case, the agreement between the FTC and Volkswagen requires that the arbitration hearing be completed within 60 days of your request for mediation or arbitration.

THE ARBITRATION PROCESS

It is important for you to know what issues Volkswagen will arbitrate and those which it need not arbitrate. Volkswagen **must** arbitrate your claims for the cost of completed repairs,—including the estimated cost for a repair involving internal engine components that had not been performed but that was still needed when you sold the car (**BE SURE to follow the instructions on page 7, if you decide to sell your car**), and for expenses related to your complaint. Examples of such expenses include the cost of towing, rental cars, telephone calls, storage fees for your car, and hotel bills. The maximum amount you may claim is what you paid for the car plus related expenses.

Issues that may **not** be arbitrated in the BBB program include punitive damages, loss of business income, insurance claims, personal injury and property damage claims, and allegations of fraud or other violations of criminal law. Such issues are best [5] dealt with in a court of law, and you are free to pursue such claims outside the context of arbitration.

Remember, this brochure only covers the program to resolve engine problems. If your complaint concerns another component, you may be eligible under VW's voluntary program. Call your local BBB office for details.

Who Are The Arbitrators?

Thousands of volunteers from all walks of life serve the BBB as arbitrators—decision makers—in these cases. They include professionals, educators, retirees, lawyers, housewives, and others, who have gone through a special training program. Arbitrators are not employed by the BBB, nor are they paid for their services. They perform this duty as a public service. All arbitrators are required to disclose, as a condition of hearing a case, any financial, commercial, professional, social or familial relationship—no matter how remote—with any of the parties or their counsel. No more than one-third of the arbitrators on the selection list sent to you by the BBB may be persons at a supervisory level in a company that makes, services, or sells a product. In all cases, your dispute will be decided by someone who is completely independent and has no vested interest in the outcome.

Choosing An Arbitrator

Although state law and BBB policies offer various means of choosing arbitrators, normally you will be given a list of trained community volunteers together with a brief biography of each. You will be asked to cross off any arbitrator with whom you may have a business, financial, or social relationship, to select the arbitrator who is your first choice, and to indicate your priority preference ("1", "2," "3," etc.) for the remaining names. Where state law requires it, a panel of three arbitrators may decide your case. VWoA will take no part in the selection of the arbitrator.

After you have returned your arbitrator choices to the BBB, along with an indication of the times when you will *not* be available to attend a hearing, the BBB will tell you when and where the hearing is to be held. If you have chosen to present your case in writing or by telephone, you also must make that choice known to the BBB. [6]

What Does Arbitration Cost?

The agreement between Volkswagen and the FTC requires Volkswagen to pay the costs of AUTO LINE. You will have no costs unless you choose to bring your own paid witnesses or retain an attorney. Copies of records and documents that are a part of the hearing will be available to you at any time for a reasonable cost. Also, if you want a recording of the entire proceedings, you must pay recording expenses.

The Hearing

The actual hearing is an informal session. It is designed to ensure that you and Volkswagen's representative get a full opportunity to describe the dispute to the arbitrator.

Normally, arbitration hearings are held at the BBB during regular working hours; however, the BBB will schedule a time and place convenient to you and to the others involved.

The hearings usually feature in-person presentations, during which each side presents its case to an arbitrator and all have an opportunity to ask questions, including the arbitrator. Most consumers choose to have in-person hearings, and the BBB believes this is the best way of getting all the facts before the arbitrator. However, you also have the option of presenting your case by telephone or in writing.

A Volkswagen representative usually will attend the hearing to present its case. However, Volkswagen, at its option, also may choose to present its case by telephone or mail (if you appear in person), or by mail (if you present your case by telephone). You always may present your case in person, even if Volkswagen does not.

You may be represented by an attorney or other spokesperson, bring witnesses and present documents, bills, and any other information to prove your case. If you are being represented by a lawyer, tell the BBB as soon as possible so that Volkswagen can be given an opportunity to get legal counsel.

At no time may you or your representative or Volkswagen or its representative contact the arbitrator without the other party being present. All communications relating to the arbitration must be directed through the BBB. It will forward all information and make sure the other side gets copies when necessary.

When Are Inspections And Technical Advisers Involved?

Sometimes the arbitrator will want to see the car or the repair work to get a full understanding of the facts. The BBB [7] will send you a notice of the inspection time and place. You should be present for such an inspection, and you have a right to bring your own expert if you wish. Should the arbitrator request a technical adviser, the BBB will identify experts in the community who have no relationship with any party and are not potential competitors of Volkswagen.

WHAT TO DO IF YOU WANT TO SELL YOUR CAR RIGHT AWAY

If you decide to sell your car after you notify the BBB, but before the arbitration hearing, this is what you must do to remain eligible for the arbitration program:

1. You must notify Volkswagen at least ten days in advance that you intend to sell the vehicle; and
2. You must give Volkswagen an opportunity to inspect the vehicle before it is sold;

If you sell the vehicle before the problem that prompted the claim is repaired, your recovery will be limited to the estimated repair costs (plus expenses for towing, storage fees, rental car costs, telephone and hotel bills);

If you arbitrate a claim for an unrepaired problem on a car that you sold, the party that had the problem repaired is not eligible for arbitration for that problem; likewise, you may not arbitrate a claim for which a previous owner of the car had already accepted an arbitration award.

HOW TO PREPARE FOR ARBITRATION?

Before coming to the hearing, you should prepare an outline of your argument to help you in your presentation. In that way, you won't forget important points in your favor. To assist you in your preparation, a checklist is given at the end of this section.

Also, before coming to the hearing, you should prepare a list of questions you want to ask Volkswagen. During the hearing, you can add to your list of questions. Include anything new that occurs to you when you hear what the other side has to say.

After you state the facts as you see them, Volkswagen has a right to ask you questions. After Volkswagen has stated the facts as they see them, you have the same right to ask them questions. To clarify uncertain areas and to gain a fuller understanding of the dispute, the arbitrator also is trained to ask questions. [8]

After each side has presented its case and the questioning is completed, you should be prepared to give a summary of your position. Try to describe the weak points in Volkswagen's case, deal with any questions that have not otherwise been answered, and tell the arbitrator exactly what kind of decision you want and why. Remember that the sole purpose of the hearing is to allow the arbitrator to gather and sort the facts and thus make a fair decision. You should be prepared to convince the arbitrator that your position is right and that your opponent's is wrong.

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An Arbitration Checklist

Given here is a checklist to help you prepare for your arbitration hearing. Use whatever items are appropriate to your case; some may not apply.

1. Collect and bring to the hearing all available written information relating to the car and your dispute, especially those noted below. Bring original documents, if possible, and copies for the arbitrator and for the Volkswagen representative. If you do not have documents, sometimes you can get copies from your repair shop, bank, or credit card company. Remember that, although documents are helpful, you are still eligible for a hearing even if you do not have them. Documents that might be useful include:

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2. List any witnesses who may have information about your complaint, such as mechanics or sales personnel. Try to contact them, if you want them to testify in person or to submit written information. You are responsible for your [9] witnesses' submission of information. If you want them to testify in person, keep them informed about the time and place of the hearing.

3. List in chronological order the actions you took to resolve this dispute. Clearly state what the problem is, and why you think the company is responsible.

- To whom did you first speak?
- When did this happen?
- What did they tell you, and/or what action did they take?
- Were other business/service persons involved?
  -Who?
  -When?
  -Why?
  -What did they tell you and/or what action did they take?
  (Written statements or the presence of witnesses are preferable to your statements, if these are important to your case.)

WHAT HAPPENS AFTER THE ARBITRATOR MAKES A DECISION?

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If you accept it, Volkswagen is legally bound to comply. If the arbitrator's decision awards you money, Volkswagen must pay you that amount within 45 days of the date you accept the decision. If the arbitrator orders Volkswagen to repair your car, that repair must be performed within 30 days of the date your acceptance of the arbitrator's decision is received by the BBB, unless the arbitrator rules, for good cause, that the 30 day deadline should be modified. If you notify the BBB that the repair ordered was not performed or was performed unsatisfactorily, the arbitrator will have 30 days from the date you notify the BBB of that fact to forward a final decision.

If you do not think the manufacturer has complied with the decision, you first should contact the BBB or the FTC (Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Ave., N.W., Washington, D.C. 20580 (202) 326-3037). However, you also may take the award to an appropriate court and have it enforced as if it were a judgment or order of the court—without a rehearing of the case. **[10]**

If either party believes the final decision contains errors of fact or is unclear, the party may petition the BBB to request the arbitrator to modify or clarify the matter. This is done by making a written request to the BBB which, if it finds the request to have merit, will make a copy for the other party's response, and then will send both documents to the arbitrator. The arbitrator's response to such a request is final.

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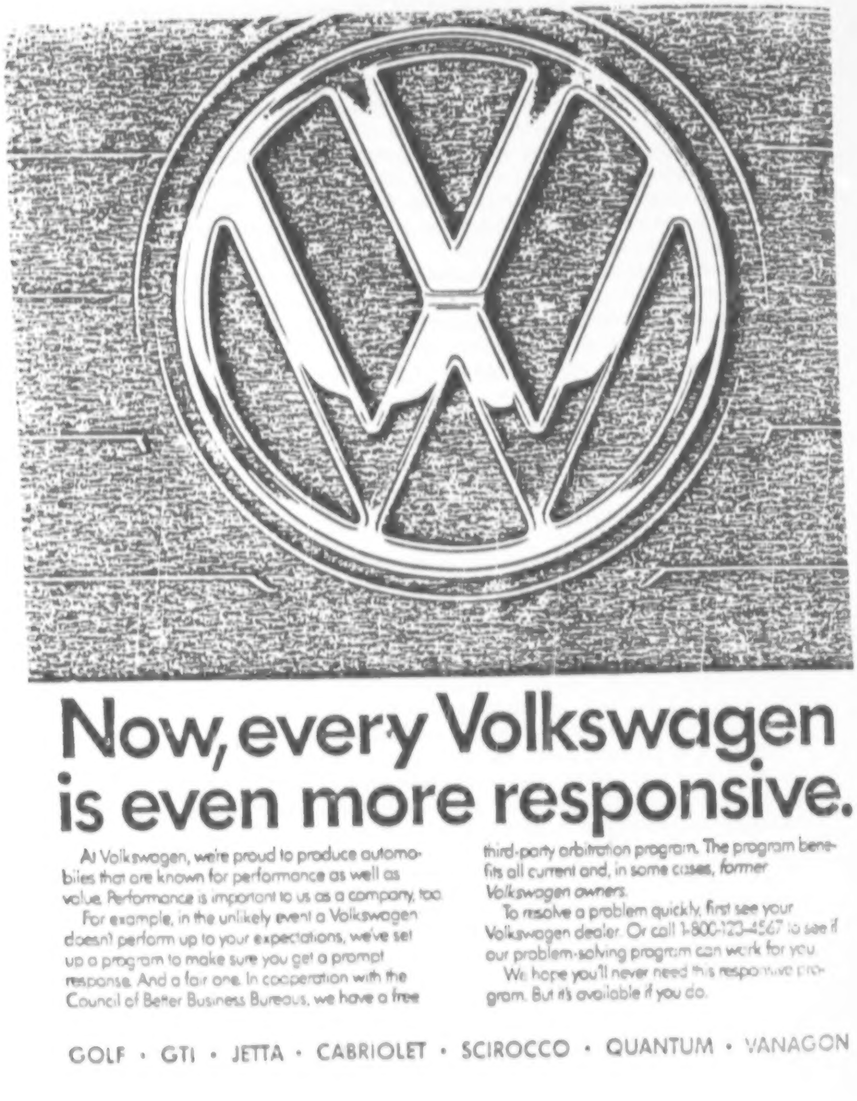
If you have any problems or complaints about the arbitration process, contact the Federal Trade Commission, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Ave., N.W., Washington, D.C. 20580.

ATTACHMENT H(1)



Now, every Volkswagen is even more responsive.

At Volkswagen, we're proud to produce automobiles that are known for performance as well as value. Performance is important to us as a company, too.

For example, in the unlikely event a Volkswagen doesn't perform up to your expectations, we've set up a program to make sure you get a prompt response. And a fair one. In cooperation with the Council of Better Business Bureaus, we have a free third-party arbitration program. The program benefits all current and, in some cases, *former Volkswagen owners.*

To resolve a problem quickly, first see your Volkswagen dealer. Or call 1-800-123-4567 to see if our problem-solving program can work for you.

We hope you'll never need this responsive program. But it's available if you do.

GOLF · GTI · JETTA · CABRIOLET · SCIROCCO · QUANTUM · VANAGON

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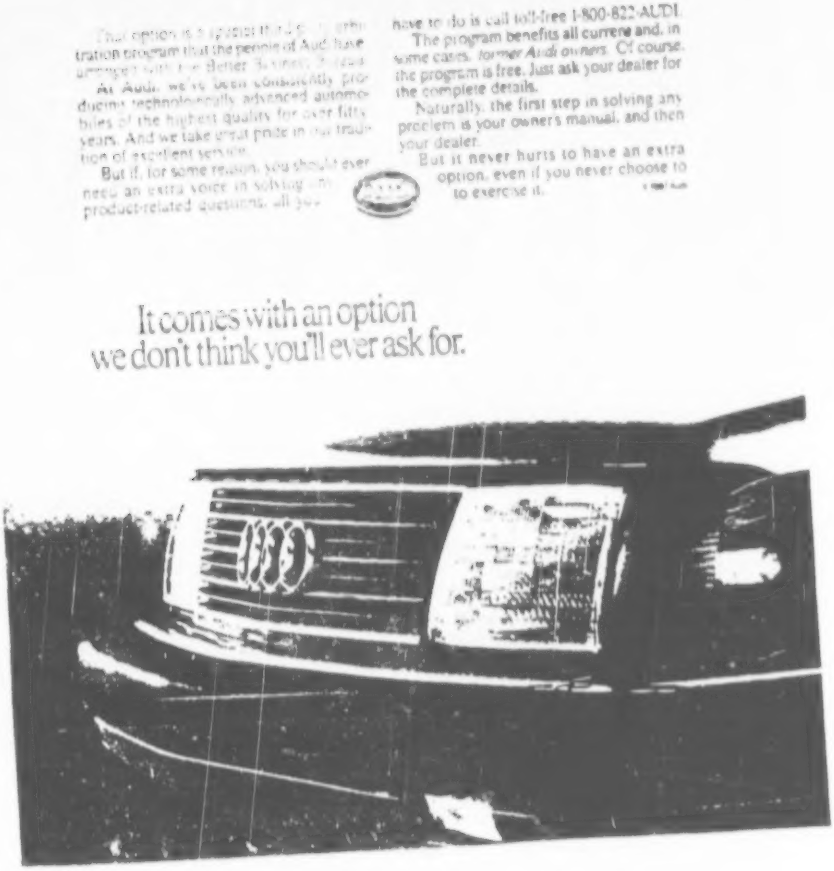
ATTACHMENT H (2)



That option is a special third-party arbitration program that the people of Audi have arranged with the Better Business Bureau.

At Audi, we've been consistently producing technologically advanced automobiles of the highest quality for over fifty years. And we take great pride in our tradition of excellent service.

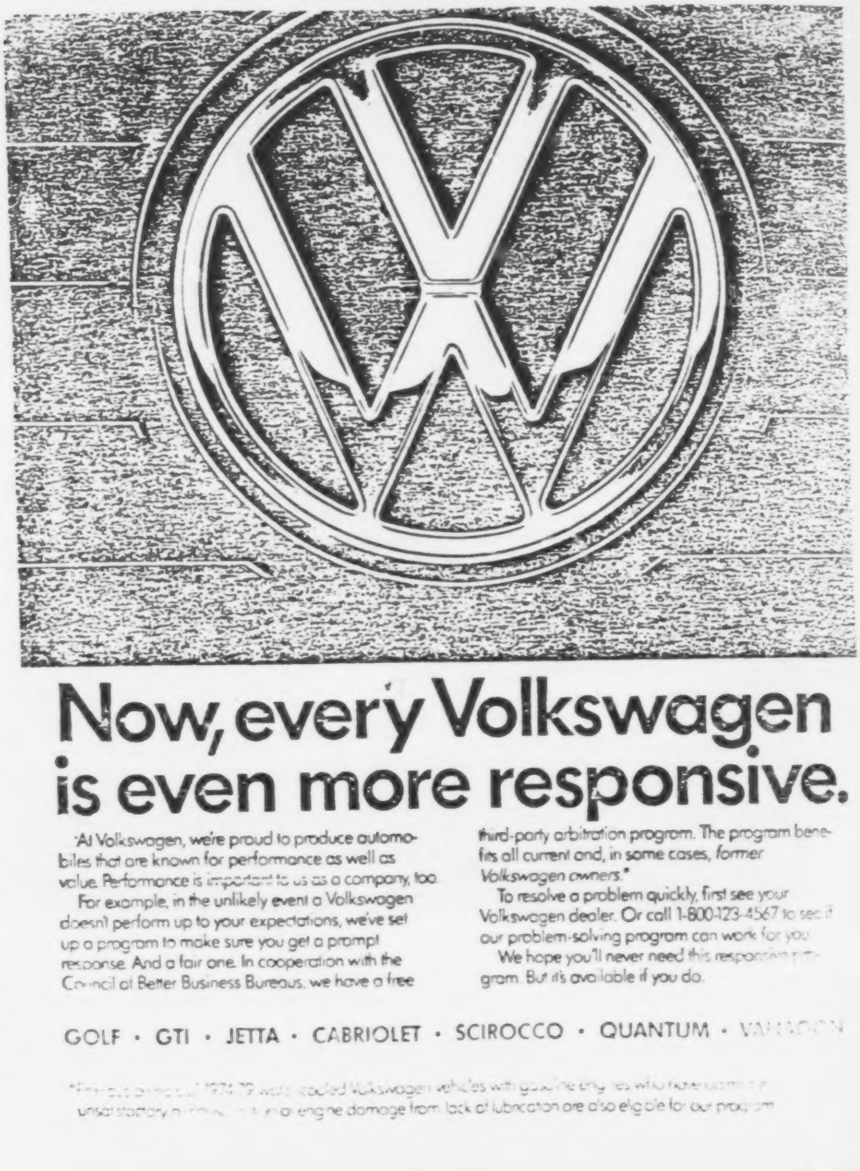
But if, for some reason, you should ever need an extra voice in solving any product-related questions, all you have to do is call toll-free 1-800-822-AUDI.

The program benefits all current and, in some cases, *former Audi owners.* Of course, the program is free. Just ask your dealer for the complete details.

Naturally, the first step in solving any problem is your owner's manual, and then your dealer.

But it never hurts to have an extra option, even if you never choose to to exercise it.

ATTACHMENT I (1)



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GOLF · GTI · JETTA · CABRIOLET · SCIROCCO · QUANTUM · VANAGON

*Previous owners of 1974-79 water-cooled Volkswagen vehicles with gasoline engines who have [illegible] unsatisfactory [illegible] engine damage from lack of lubrication are also eligible for our program

best copy available

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ATTACHMENT I (2)

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But it never hurts to have an extra option, even if you never choose to to exercise it.

© 1987 Audi

It comes with an option
we don't think you'll ever ask for.

*Previous owners of 1974-1979 Audi vehicles with gasoline engines who have claims for unsatisfactory oil consumption or engine damage from lack of lubrication are also eligible for our program.

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

The consent order in this matter contains a number of injunctive relief provisions, and provides consumer redress in the form of a Commission-supervised arbitration process administered by the Better Business Bureau. Although I believe these provisions satisfy the Commission's concerns, the negotiated order is not one I would have chosen. I am nevertheless reluctant to suggest order revisions that might throw this matter back into the costly litigation that has already consumed many years of Commission resources. Accordingly, I have voted in favor of final acceptance of the consent order.

Two aspects of the final order concern me. First, I would have preferred an order without the prospective redress provisions in the arbitration mechanism. That mechanism resolves not only consumer disputes regarding the defects cited in the complaint, but also other internal engine component problems. Although this mechanism is similar to the relief obtained from another automobile manufacturer in a related matter (see *General Motors* consent order, D-9145), I do not favor its general application.

To begin with, the arbitration mechanism is needlessly regulatory. If Volkswagen ("VWoA") wants to negotiate and resolve consumer complaints through a Better Business Bureau arbitration scheme, it should certainly be free to do so. However, active government supervision of such a scheme forces the government to maintain an active presence in the operation of a domestic auto seller for the next 8 years. Moreover, the prospective redress provisions will grant relief primarily to consumers who were not injured by the violations alleged in the complaint. In future consent orders where consumer redress is warranted, I would prefer redress provisions that confer benefits on the injured parties.

I would also have preferred to see the Commission—as an exercise of its discretion—permit VWoA to exclude members of two class actions from the coverage of the "specified claims" portion of the consent order.[1] The *Estruch* and *Nosse* class action settlements were statewide settlements—respectively filed in New York and California state courts—that established arbitration programs for repair and expense claims like those covered under the "specified claims" provisions, using procedures similar to those created by the Commission order.

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[1] Three class actions have been settled or decided since VWoA signed the proposed order on April 14, 1986. A jury verdict was rendered in favor of VWoA in a North Carolina federal district court class action in *Deaduyler v. Volkswagen of America, Inc. and Volkswagen AG*, ST-C-85-38 (W.D.N.C. June 19, 1987), *appeal pending* (*hereinafter Deaduyler*). A class action settlement was approved by a California state court in *Nosse, et al. v. Volkswagen of America, Inc.*, No. 780024 (Cal. Supr.Ct., City and County of San Francisco, July 1, 1986) (*hereinafter Nosse*). A second settlement agreement was approved by a New York state court in *Estruch, et al. v. Volkswagen of America, Inc. et al.*, Index No. 1733/81 (N.Y.Sup.Ct., Monroe County, April 23, 1987) (*hereinafter Estruch*).

In *Estruch*, all class members were informed of the existence of the Commission's arbitration program, and the notice to that effect made it clear to class members that they had two mutually exclusive choices: they could either (1) opt out of the class and file their claims under the Commission program, or (2) remain in the class and not participate in the Commission program. Because they were able to make a knowing choice between the *Estruch* class action and the Commission order, I believe that the "specified claims" portion of the Commission order should not cover members of the *Estruch* class.[2]

In *Nosse*, class members were not informed of the existence of the Commission arbitration program.[3] However, the *Nosse* settlement established a redress program that provides many of the same benefits available under the "specified claims" portion of the Commission order.[4] Class members who are dissatisfied with the redress that VWoA offers in disposition of their claims may appeal through arbitration procedures similar to those incorporated into the Commission program. In short, VWoA's compliance with the terms of the *Nosse* settlement in effect satisfies its obligations under the Commission order with respect to members of the *Nosse* class.

There is no reason to require VWoA to establish a program in California to handle claims that have already been evaluated and determined. Indeed, requiring a duplicative program may mislead consumers as to the utility of participating in the Commission program. Arbitrators handling claims under the Commission order are not likely to award redress that duplicates redress already received under the *Nosse* settlement.

I have voted in favor of final acceptance of the Commission order because I believe that it is clearly preferable to the litigation alternative. However, for the foregoing reasons, I would prefer an order that more closely adhered to the contours of the complaint in this matter, and that did not duplicate the redress already available to consumers under state court settlements.

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[2] In *Deaduyler*, the notice to class members also mentioned the Commission order. However, in my view, the notice did not make it sufficiently clear to class members that they had to choose between the class action and the Commission program. I therefore would not exclude members of the *Deaduyler* class from participation in the Commission program.

[3] The notice mailed to *Nosse* class members did include a standard waiver provision stating that "[t]he settlement of this action will bar any class member from prosecuting any further claims, including contract, warranty, fraud and punitive damages, which have been or could have been asserted relating to the matters alleged in this action." It did not, however, refer to the Commission order.

[4] For example, VWoA will automatically pay 100 percent of fully documented reimbursable repairs and incidental expenses incurred during the first 50,000 vehicle miles—and pay 50 percent of such expenses incurred between 50,000 to 75,000 vehicle miles—for claims that would be characterized as "specified claims" under the Commission order. Claims not fully documented will be rejected by VWoA only where VWoA has substantial reason to question their validity or amount.

IN THE MATTER OF

MEDICAL STAFF OF DOCTORS' HOSPITAL OF PRINCE GEORGE'S COUNTY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3226. Complaint, April 14, 1988—Decision, April 14, 1988

This consent order prohibits, among other things, the medical staff of a hospital in Prince George's County, Maryland from engaging in concerted, coercive conduct to prevent or impede a health maintenance organization or others from offering health care services.

Appearances

For the Commission: *Jane R. Seymour.*

For the respondent: *Richard C. Morgan* and *H. Robert Halper, O'-Connor & Hannan,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Medical Staff of Doctors' Hospital of Prince George's County has violated the provisions of said Act, and it appearing that a proceeding by it would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. The respondent, Medical Staff of Doctors' Hospital of Prince George's County ("Medical Staff"), is an unincorporated association, organized and existing under the laws of the State of Maryland, and is located at Doctors' Hospital of Prince George's County ("Hospital") at 8118 Goodluck Road, Lanham, Maryland. The Medical Staff is composed of all physicians, dentists and podiatrists who have been granted privileges to treat patients at the Hospital.

PAR. 2. Most, if not all, members of the Medical Staff are engaged in the business of providing health care services for a fee. Except to the extent that competition has been restrained as herein alleged, most, if not all, members of the Medical Staff have been and are now in competition among themselves and with other health care providers in Prince George's County, Maryland. The Medical Staff's physician members constitute approximately half of the practicing physicians in Prince George's County.

PAR. 3. The Medical Staff engages in substantial activities for the economic benefit of its members. It is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act.

PAR. 4. The acts and practices herein alleged are in commerce or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. By impeding the operations of the Health Plan, an interstate business, as alleged herein, respondent has affected commerce. In addition, members of the Medical Staff charge fees and collect payments that, in substantial part, are paid directly or indirectly with federal funds or funds received interstate from insurance companies, employers and other payers. The Medical Staff's members also purchase and use drugs, supplies and other health care equipment manufactured outside the State of Maryland. The flow of such funds and equipment is affected by the acts and practices of the Medical Staff and its members as herein alleged.

PAR. 5. The Hospital is a general, acute-care hospital with 250 beds. It is owned by American Medical International, Inc. ("AMI"). At the time of the acts and practices herein alleged, AMI was also the majority owner of the George Washington University Health Plan ("the Health Plan"), a health maintenance organization ("HMO"). At the time of the herein alleged acts and practices, the Health Plan, which had approximately 19,000 members, had offices only in Washington, D.C. Federal Government employees and their dependents constitute a substantial portion of the Health Plan's members.

PAR. 6. In October 1985, the Health Plan announced its plan to open an HMO facility in Prince George's County. This HMO facility was to be the Health Plan's first facility in Prince George's County, and the Health Plan intended to staff it with full-time faculty members of George Washington University. The Health Plan's purpose in opening this HMO site was to expand its operations from Washington, D.C., into Maryland in order to enhance its competitive position in the populous suburban areas around Washington, D.C.

PAR. 7. Beginning at least as early as November 1985, the Medical Staff, acting as a combination of its members or in conspiracy with at least some of its members, attempted to and did prevent, impede, or limit the operations of the Health Plan in Prince George's County. The principal purpose of the Medical Staff and its members in engaging in this combination or conspiracy was to protect Medical Staff members from competition. The specific competitive concerns of the members of the Medical Staff included the following:

A. Members engaged in primary care were concerned that they would lose both present and potential patients to the new Prince George's County HMO facility;

B. Members who are specialists were concerned that they would lose referrals to specialists connected with George Washington University; and

C. Members did not want the Hospital's owner, AMI, to compete with them through the Health Plan.

PAR. 8. In furtherance of this combination or conspiracy, the then-President of the Medical Staff appointed an Ad Hoc Task Force to meet with AMI officials. In meetings between the Ad Hoc Task Force and AMI officials and in other contacts with AMI officials and others, representatives of the Medical Staff threatened, coerced and pressured AMI not to open its planned HMO facility in Prince George's County. Representatives of the Medical Staff threatened that the Medical Staff would act collectively to prevent AMI from opening the planned HMO facility, and if AMI opened the facility the members of the Medical Staff would force the Hospital to close.

PAR. 9. As a result of the combination, conspiracy, acts and practices herein described, AMI and the Health Plan suspended their plans to open a new HMO facility in Prince George's County. However, AMI could not totally abandon its plans to operate an HMO in Prince George's County because it had made a commitment to the Federal Office of Personnel Management to provide a Health Plan facility located in Prince George's County for Federal employees from January 1, 1986, to December 31, 1986. AMI therefore entered into a temporary, one-year arrangement with certain members of the Medical Staff to treat the Health Plan patients in the members' private offices. In January of 1986, the Health Plan began operations in Prince George's County pursuant to the temporary arrangement. This arrangement, however, did not provide advantages that the planned HMO facility would have provided.

PAR. 10. At the end of 1986, AMI announced that it had sold its majority interest in the Health Plan back to George Washington University. The University opened the previously planned HMO facility in Prince George's County in March of 1987.

PAR. 11. The effects, tendency or capacity of the combination, conspiracy, acts and practices described in paragraphs six through eight are and have been to restrain trade unreasonably and hinder competition in the provision of health care services in Prince George's County and to deprive consumers of the benefits of competition in the following ways, among others:

A. Competition was restrained between physicians and the Health

Plan, and between the Health Plan and other prepaid health plans in Prince George's County;

B. The Health Plan's patients and other consumers were deprived of the benefits of competition, including certain benefits offered by the planned HMO facility; and

C. The Health Plan was restricted in its ability to serve consumers and compete in the provision of health care services.

PAR. 12. The combination, conspiracy, acts and practices herein described constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Such combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent, Medical Staff of Doctors' Hospital of Prince George's County, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedures prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent, Medical Staff of Doctors' Hospital of Prince George's County, an unincorporated association organized and existing under the laws of the State of Maryland, has its principal place of business

at Doctors' Hospital of Prince George's County, 8118 Goodluck Road, Lanham, Maryland.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent, and the proceeding is in the public interest.

ORDER

I.

For purposes of this order, the following definitions shall apply:

A. *"Medical Staff"* means the respondent Medical Staff of Doctors' Hospital of Prince George's County, its officers, agents, representatives, employees, committees, task forces, and its successors or assigns.

B. *"Corrective action"* means action taken pursuant to and in conformance with the Medical Staff's by-laws against any person with clinical privileges at Doctors' Hospital of Prince George's County who fails to provide evidence of malpractice insurance coverage or whose professional conduct or activities are detrimental to patient safety or to the delivery of quality patient care or are unreasonably disruptive to the operation of Doctors' Hospital of Prince George's County.

C. *"Integrated joint venture"* means a joint arrangement to provide pre-paid health care services in which physicians who would otherwise be competitors pool their capital to finance the venture, by themselves or together with others, and share substantial risk of adverse financial results caused by unexpectedly high utilization or costs of health care services.

II.

It is ordered, That the Medical Staff, directly, indirectly, or through any device, in connection with the provision of health care services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from organizing, facilitating, or acting in furtherance of any agreement or combination, either express or implied, among any physicians, to refuse, or threaten to refuse, to deal with, or otherwise coerce, any person or entity for the purpose or with the effect of preventing or restricting the offering or delivery of health care services by any health maintenance organization, hospital or other health care facility.

III.

A. *It is provided,* That this order shall not be construed to prohibit the Medical Staff or its members from engaging, pursuant to the Medical Staff's by-laws, in credentialling, corrective action, utilization review, quality assurance, peer review, or hospital policy-making at Doctors' Hospital of Prince George's County, where such conduct by the Medical Staff neither constitutes nor is part of any agreement, combination, or conspiracy the purpose or effect of which is to impede unreasonably the development or operation of any health maintenance organization, hospital or other health care facility.

B. *It is further provided,* That this order shall not be construed to prohibit the Medical Staff from facilitating the formation of an integrated joint venture that refuses to deal with any person or entity, as long as the physicians participating in the joint venture remain free to deal with any third-party payer other than through the joint venture.

IV.

A. *It is further ordered,* That within thirty (30) days after service of this order, the Medical Staff shall mail a copy of this order and the accompanying complaint to the Executive Director of Doctors' Hospital of Prince George's County, to the President of the George Washington University Health Plan, and to each of the Medical Staff's members.

B. *It is further ordered,* That the Medical Staff shall, within sixty (60) days after service of this order, and at any time the Commission, by written notice, may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which the Medical Staff has complied and is complying with this order.

C. *It is further ordered,* That the Medical Staff shall promptly notify the Commission of any change in the Medical Staff's business address or of any proposed change in its organization that may affect compliance obligations arising out of this order.

Commissioner Bailey not participating.

IN THE MATTER OF

MULTIPLE LISTING SERVICE MID COUNTY, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3227. Complaint, April 20, 1988—Decision, April 20, 1988

This consent order prohibits, among other things, a Brooklyn, N.Y. real estate firm from participating in various practices that have allegedly restrained price and service competition among residential real estate brokers. Respondent is prohibited from: requiring that any applicant or member operate a full time office; fixing, maintaining or recommending any division of commission between selling and listing brokers; adopting any policy that has the purpose or effect of exclusive agency listings; requiring any member to inform Mid County or any of its members of the commission agreed to between any listing broker and homeowner; and adopting any policy having the purpose or effect of delaying the solicitation of a listing agreement.

Appearances

For the Commission: *Michael J. Bloom* and *Alfred J. Ferrogari.*

For the respondent: *Bruce H. Schneider, Stroock, Stroock, & Lavan,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Multiple Listing Service Mid County Inc. ("Mid County"), a corporation, has violated and is violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. As used in this complaint:

(1) *"Multiple listing service"* shall mean a clearinghouse through which member real estate brokerage firms regularly and systematically exchange information on listings of real estate properties and share commissions with other members.

(2) *"Broker"* shall mean any person, firm, or corporation that, for another and for a fee or commission, lists for sale, sells, exchanges, or

offers or attempts to negotiate a sale, exchange, or purchase of an estate or interest in real estate.

(3) *"Applicant"* shall mean any owner or co-owner of a real estate brokerage firm who is duly licensed as a real estate broker within the State of New York, and who has applied on behalf of his or her firm for membership in respondent's multiple listing service.

(4) *"Member"* shall mean any real estate brokerage firm that is entitled to participate in the multiple listing service offered by Mid County.

(5) *"Listing agreement"* shall mean any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

(6) *"Listing broker"* shall mean any broker who lists a real estate property with a multiple listing service pursuant to a listing agreement with the property owner.

(7) *"Selling broker"* shall mean any broker, other than the listing broker, who locates the purchaser for a listed property.

(8) *"Exclusive agency listing"* shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property at an agreed commission, but reserves the right to sell the property personally to a direct buyer (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed to the agent broker.

(9) *"Exclusive right to sell listing"* shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property, and agrees to pay the broker an agreed commission if the property is sold, whether the purchaser is located by the broker or any other person, including the owner.

(10) *"Mid County's Service Area"* shall mean the territory within which Mid County provides its multiple listing service.

PAR. 2. Mid County is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1706 Flatbush Avenue, Brooklyn, New York.

PAR. 3. Mid County is and has been at all times relevant to this complaint a corporation organized for its own profit or for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 4. In the course and conduct of their businesses, and through the policies, acts and practices described below, Mid County and its members are involved with or affect:

(a) a substantial interstate flow of funds used in the financing of real estate located within Mid County's Service Area;

(b) a substantial amount of financing of real estate located within Mid County's Service Area that is guaranteed or insured under federal government programs;

(c) the sale of a substantial amount of title and homeowners' insurance by interstate insurers to owners of property located within Mid County's Service Area; and

(d) the franchise operations of those interstate chains of real estate brokerage firms that include one or more members of respondent Mid County.

As a result, the general business practices of respondent and its members are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

PAR. 5. Mid County is, and for some time has been, providing a multiple listing service for member real estate brokerage firms.

The member firms are owned and operated by real estate brokers who, for a commission, provide the service of bringing together buyers and sellers of residential real estate located within Mid County's Service Area, as well as other services designed to facilitate sales of such properties.

Each member agrees to submit all of its exclusive agency listings and exclusive right to sell listings pertaining to residential real estate located within Mid County's Service Area for publication to the entire membership of the multiple listing service, and to share commissions with those member firms that successfully locate purchasers for properties it has listed.

Only members may participate in the multiple listing service.

PAR. 6. Membership in Mid County's multiple listing service provides valuable competitive advantages in the brokering of residential real estate sales in Mid County's Service Area. Membership significantly increases the opportunities for brokerage firms to enter into listing agreements with residential property owners, and significantly reduces the costs of obtaining up-to-date and comprehensive information on listings and sales.

PAR. 7. Publication of listings on Mid County's multiple listing service generally is considered by sellers and their brokers to be the fastest and most effective means of obtaining the broadest market exposure for residential property in Mid County's Service Area.

PAR. 8. Sales of real estate listings published on Mid County's multiple listing service totaled about $30.3 million in 1983, $38.9 million in 1984, and for 1986, reached $53.8 million. Almost the entire dollar volume of such listings consisted of sales of residential real estate located within Mid County's Service Area.

PAR. 9. Except to the extent that competition has been restrained as described herein, Mid County's members are and have been in competition among themselves in the provision of residential real estate brokerage services within Mid County's Service Area.

Par. 10. In adopting the policies and engaging in the practices described in paragraphs eleven through sixteen below, Mid County has been and is acting as a combination of its members, or in conspiracy with some of its members, to restrain trade in the provision of residential real estate brokerage services within Mid County's Service Area.

Par. 11. Mid County required as a condition of membership in Mid County that each applicant operate a full-time real estate brokerage office.

The purposes, capacities, tendencies or effects of this requirement have been to impede new membership in Mid County and to impede entry into the business of brokering residential real estate sales in Mid County's Service Area.

Par. 12. Mid County required that the listing broker retain no more than 40% of the commission due on the sale of residential real estate subject to an exclusive right to sell agreement, and that the remainder go to the selling broker.

Mid County required that the listing broker retain no more than 30% of the commission due on the sale of residential real estate subject to an exclusive agency listing, and that the remainder go to the selling broker.

The purposes, capacities, tendencies or effects of these limitations on the listing broker's ability to retain commissions have been to deprive consumers of the advantages of competition among Mid County's members to list and to sell residential real estate in Mid County's Service Area.

Par. 13. Mid County subsequently revised its rules to provide that the listing broker shall have exclusive discretion as to the terms of the division of commissions. The term "exclusive discretion," in this context, may be construed as excluding the homeowner from any role in the determination of the division of commissions between the listing broker and the selling broker.

The capacities, tendencies or effects of this rule have been to deprive consumers of the competitive advantages of negotiating with the listing broker the division of commissions.

Par. 14. Article 6 of Mid County's Code of Ethics states: "To prevent dissension and misunderstanding and to assure better service to the owner, the broker should urge the exclusive listing of property unless contrary to the best interests of the owner." The phrase "exclusive listing of property," in this context, may be construed as referring only to exclusive right to sell listings.

The capacities, tendencies or effects of Article 6 of Mid County's

Code of Ethics have been and are to discourage brokers from soliciting or accepting exclusive agency listings, and to deprive consumers of the advantages of competition with respect to the types of real estate brokerage services offered by Mid County's members.

PAR. 15. Mid County has required and continues to require that brokers disclose to one another, or to Mid County, the total commission or the split of commission.

The purposes, capacities, tendencies or effects of this policy or practice have been to fix commission rates, and to reduce the likelihood of discounting or other price competition among members of Mid County.

PAR. 16. Mid County enforced a rule prohibiting any member other than the listing broker from soliciting the listing of any property, the listing of which is filed with the multiple listing service, until the filed listing has expired.

The purposes, capacities, tendencies or effects of this practice have been to restrain competition by members other than listing brokers to obtain renewal of listings of properties located within Mid County's Service Area, to stabilize the price of brokerage services pertaining to the sale of residential real estate located in Mid County's Service Area, and to deprive owners of property located within Mid County's Service Area of the advantages of price and other forms of competition that otherwise would be offered.

PAR. 17. The policies, acts, practices, and combinations or conspiracies described in paragraphs ten through sixteen above constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

The alleged conduct may continue or recur in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

(1) Respondent Multiple Listing Service Mid County Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1706 Flatbush Avenue. Brooklyn, New York.

(2) The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and the respondent, and the proceeding is in the public interest.

ORDER

Definitions

For purposes of this order, the following definitions shall apply:

(1) *"Multiple listing service"* shall mean a clearinghouse through which member real estate brokerage firms regularly and systematically exchange information on listings of real estate properties and share commissions with other members.

(2) *"Broker"* shall mean any person, firm, or corporation that, for another and for a fee or commission lists for sale, sells, exchanges, or offers or attempts to negotiate a sale, exchange, or purchase of an estate or interest in real estate.

(3) *"Applicant"* shall mean any owner or co-owner of a real estate brokerage firm who is duly licensed as a real estate broker within the State of New York and who has applied on behalf of his or her firm for membership in respondent's multiple listing service.

(4) *"Member"* shall mean any real estate brokerage firm that is entitled to participate in the multiple listing service offered by Mid County.

(5) *"Listing agreement"* shall mean any agreement between a real

estate broker and a property owner for the provision of real estate brokerage services.

(6) *"Listing broker"* shall mean any broker who lists a real estate property with a multiple listing service pursuant to a listing agreement with the property owner.

(7) *"Selling broker"* shall mean any broker, other than the listing broker, who locates the purchaser for a listed property.

(8) *"Exclusive agency listing"* shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property at an agreed commission, but reserves the right to sell the property personally to a direct buyer (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed to the agent broker.

(9) *"Exclusive right to sell listing"* shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property and agrees to pay the broker an agreed commission if the property is sold, whether the purchaser is located by the broker or any other person, including the owner.

I.

It is ordered, That respondent Mid County, its successors and assigns, and its directors, officers, committees, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with respondent's operation of a multiple listing service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

(A) Requiring, urging, recommending or suggesting that any applicant or member:

(1) operate an office full-time or during customary or specified hours;

(2) derive any particular amount or portion of income from real estate brokerage; or

(3) engage in real estate brokerage full-time or during customary or specified hours;

Provided, however, That nothing contained in this subpart shall prohibit respondent from adopting or enforcing any reasonable and nondiscriminatory policy to assure that its members are actively engaged in real estate brokerage and that listings published on respondent's multiple listing service are adequately serviced.

(B) Adopting any policy or taking any other action that has the purpose or effect of unreasonably discriminating against any prospective applicant, applicant or member that is a new entrant in the market or new to respondent's multiple listing service.

(C) Fixing, establishing, maintaining, recommending or suggesting any rate, range or amount of any division or split of commission or other fees between any selling broker and any listing broker.

(D) Adopting or maintaining any policy or taking any other action that has the purpose or effect of restricting any homeowner's participation in the determination of the division or split of commission or other fees between any listing broker and any selling broker.

(E) Restricting or interfering with:

(1) any broker's offering or accepting any exclusive agency listing; or

(2) the publication on respondent's multiple listing service of any exclusive agency listing of a member;

Provided, however, That nothing contained in this subpart shall prohibit respondent from: (a) including a simple designation, such as a code or symbol, that a published listing is an exclusive agency listing; or (b) applying reasonable terms and conditions equally applicable to the publication of any listing, whether exclusive agency or exclusive right to sell.

(F) Requiring any member to publish or otherwise distribute to or among members of respondent, or to respondent, the rate or amount of commission agreed to between any listing broker and any property owner; provided, however, that nothing contained in this subpart shall prohibit respondent from publishing or otherwise distributing to or among members of respondent the rate or amount of commission to be paid.

(G) Adopting or maintaining any policy, or taking any other action that has the purpose, capacity, tendency or effect of prohibiting, discouraging or delaying the solicitation of a listing agreement for any property; provided, however, that nothing contained in this subpart shall prohibit respondent from adopting or enforcing any reasonable and nondiscriminatory policy that prohibits any member from using information provided to it by Mid County that pertains to a specific listed property in the solicitation of a listing agreement for that property.

II.

It is further ordered, That respondent Mid County shall:

(A) Within thirty (30) days after this order becomes final, furnish an announcement in the form shown in Appendix A to each member of Mid County.

(B) Within sixty (60) days after this order becomes final, amend its by-laws, rules and regulations, and other of its materials to conform to the provisions of this order and provide each member with a copy of the amended by-laws, rules and regulations, and other materials.

(C) For a period of three (3) years after this order becomes final, furnish an announcement in the form shown in Appendix A to each new member of Mid County within thirty (30) days of the new member's admission.

III.

It is further ordered, That respondent Mid County shall:

(A) Within ninety (90) days after this order becomes final, submit a verified written report to the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this order.

(B) In addition to the report required by paragraph III(A), annually for a period of three (3) years on or before the anniversary date on which this order becomes final, and at such other times as the Federal Trade Commission or its staff may by written notice to respondent require, file a verified written report with the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this order.

(C) For a period of five (5) years after this order becomes final, maintain and make available to the Commission staff for inspection and copying, upon reasonable notice, all documents that relate to the manner and form in which respondent has complied with this order.

(D) Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in respondent that may affect compliance obligations arising out of this order.

Commissioner Bailey not participating.

APPENDIX A

[Respondent's Regular Letterhead]

As you may be aware, the Federal Trade Commission has entered into consent decrees with several multiple listing services in order to halt certain multiple listing service practices. To avoid litigation, Multiple Listing Service Mid County has entered into such a consent agreement. The agreement is not an admission that Mid County or any of its members has violated any law. For your information, the substantive provisions of the consent decree are reproduced below:

ORDER

I.

It is ordered, That respondent Mid County, its successors and assigns, and its directors, officers, committees, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with respondent's operation of a multiple listing service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

(A) Requiring, urging, recommending or suggesting that any applicant or member:

(1) operate an office full-time or during customary or specified hours;
(2) derive any particular amount or portion of income from real estate brokerage; or
(3) engage in real estate brokerage full-time or during customary or specified hours;

Provided, however, That nothing contained in this subpart shall prohibit respondent from adopting or enforcing any reasonable and nondiscriminatory policy to assure that its members are actively engaged in real estate brokerage and that listings published on respondent's multiple listing service are adequately serviced.

(B) Adopting any policy or taking any other action that has the purpose or effect of unreasonably discriminating against any prospective applicant, applicant or member that is a new entrant in the market or new to respondent's multiple listing service.

(C) Fixing, establishing, maintaining, recommending or suggesting any rate, range or amount of any division or split of commission or other fees between any selling broker and any listing broker.

(D) Adopting or maintaining any policy or taking any other action that has the purpose or effect of restricting any homeowner's participation in the determination of the division or split of commission or other fees between any listing broker and any selling broker.

(E) Restricting or interfering with:

(1) any broker's offering or accepting any exclusive agency listing; or
(2) the publication on respondent's multiple listing service of any exclusive agency listing of a member;

Provided, however, That nothing contained in this subpart shall prohibit respondent from: (a) including a simple designation, such as a code or symbol, that a published listing is an exclusive agency listing; or (b) applying reasonable terms and conditions equally applicable to the publication of any listing, whether exclusive agency or exclusive right to sell.

(F) Requiring any member to publish or otherwise distribute to or among members of respondent, or to respondent, the rate or amount of commission agreed to between any listing broker and any property owner; provided, however, that nothing contained in this subpart shall prohibit respondent from publishing or otherwise distributing to or among members of respondent the rate or amount of commission to be paid.

(G) Adopting or maintaining any policy, or taking any other action that has the purpose, capacity, tendency or effect of prohibiting, discouraging or delaying the solicitation of a listing agreement for any property; provided, however, that nothing contained in this subpart shall prohibit respondent from adopting or enforcing any reasonable and nondiscriminatory policy that prohibits any member from using information provided to it by Mid County that pertains to a specific listed property in the solicitation of a listing agreement for that property.

Mid County previously revised several of its policies in response to concerns expressed by the Federal Trade Commission staff. Further, Mid County has now made additional changes to certain of its by-laws, rules, and regulations to comply with the consent agreement.

IN THE MATTER OF

FLORENCE MULTIPLE LISTING SERVICE, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3228. Complaint, April 20, 1988—Decision, April 20, 1988

This consent order prohibits, among other things, a Florence S.C. firm from conspiring to exclude certain licensed real estate brokers from membership in and use of the multiple listing service, and from restricting competition among multiple listing service members in the services they individually provide to the public. Respondent is also prohibited from requiring new members to have owned and operated a business for six months before application for membership and from insisting on a vote of FMLS members as a condition of membership.

Appearances

For the Commission: *Jacques Feuillan.*

For the respondent: *John A. McInnes, Florence Multiple Listing Service, Inc.*, Florence, S.C. and *Haigh Porter, Haigh Porter, P.C.*, Florence, S.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Florence Multiple Listing Service, Inc., a corporation, has violated and is violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. As used in this complaint:

a. *"Listing"* shall mean any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

b. *"Exclusive right to sell listing"* shall mean any listing under which a property owner appoints a specified broker as his or her exclusive agent for the sale of a property and contracts to pay to that broker an agreed commission if a ready, willing and able buyer is procured or if the property is sold, whether by the broker or by any other person, including the owner.

PAR. 2. Respondent Florence Multiple Listing Service ("FMLS") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of South Carolina. FMLS's principal office and place of business is located at 121 S. Warley Street, Florence, South Carolina, in Florence County. The 1986 population of Florence County was approximately 110,000, and the 1986 population of the City of Florence (which is that County's largest city) was approximately 30,000.

PAR. 3. FMLS is now, and since 1972 has been, providing a multiple listing service for its members' real estate brokerage firms in parts of Florence County, including the city of Florence and town of Timmonsville, and in Darlington County, including the City of Darlington ("the Florence area"). The 1986 population of the City of Darlington was approximately 8,000. The FMLS members' firms are owned and operated by real estate brokers. Each member of FMLS owns 250 shares of its stock, which are non-transferable except between the members and FMLS. Only members' firms may participate in the FMLS's multiple listing service. Each member agrees to submit his or her firm's Florence area exclusive right to sell listings for publication on the multiple listing service to the entire FMLS membership, and to share any brokerage commissions due with any member whose firm successfully locates a purchaser for any property so listed. FMLS charges its members a fee for each new listing published on its multiple listing service. Payment of the fee entitles the member to have his or her listing published for twelve successive months or until such time as the property is sold, whichever comes first.

PAR. 4. Membership in FMLS provides valuable competitive advantages in the brokering of residential real estate in the Florence area. FMLS membership significantly increases the opportunities of members' brokerage firms to enter into listings with residential property owners, as owners generally consider FMLS publication of listings to be the fastest, most effective and most convenient means of obtaining the broadest market exposure for residential property in the Florence area. FMLS membership also significantly reduces the costs of obtaining up-to-date and comprehensive information on listings and sales.

PAR. 5. FMLS is the only real estate multiple listing service serving the Florence area. As of July 1986, real estate brokers at forty-one firms—approximately 65 percent of real estate brokerage firms operating in the Florence area—were members of FMLS. Nearly all of the active, full-time residential real estate brokers doing business in that area work at those brokerage firms. In calendar year 1985, at least 75 percent of the total dollar volume of residential real estate sales in Florence County that were transacted using the services of a real estate brokerage firm involved listings that were published on the

FMLS. Also during 1985, at least 85 percent of the total dollar volume of residential real estate sales in Florence City involved listings published on the FMLS. Sales of residential real estate listings published on the FMLS totaled approximately $40 million in 1985.

PAR. 6. In the conduct of their businesses and through the policies, acts, and practices described below, FMLS and its members are involved with or affect:

a. a substantial interstate flow of funds used in the financing of Florence area real estate;
b. a substantial amount of Florence area real estate financing guaranteed or insured under Federal government programs;
c. the sale by interstate insurers to Florence area property owners of a substantial amount of title and homeowners' insurance; and
d. the franchise operations of those interstate chains of real estate brokerage firms that include one or more members of FMLS.

As a result, the policies, acts and practices of FMLS and its members are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

PAR. 7. Real estate brokers doing business in the State of South Carolina must be licensed by the South Carolina Real Estate Commission pursuant to state law. The state law licensing requirements include:

a. completion of prescribed courses of study;
b. three years experience as a licensed salesperson; and
c. passing a written examination.

PAR. 8. Except to the extent that competition has been restrained as described below, the FMLS members and their brokerage firms are now and have been in competition among themselves and with other brokers and brokerage firms with respect to the provision of residential real estate brokerage services in the Florence area.

PAR. 9. In adopting the policies and engaging in the acts and practices described in paragraphs 10 and 11 below, the FMLS has been and is now acting as a combination of its members, or in conspiracy with some of its members or others, to restrain trade in the provision of residential real estate brokerage services in the Florence area.

PAR. 10. FMLS requires each member to abide by its bylaws, rules and regulations. If any member or member's firm is found to be in violation of any FMLS rule or other FMLS policy, the member is subject to penalties or disciplinary action, including suspension or termination of membership.

PAR. 11. Since at least 1985, FMLS has:

a. maintained a bylaw that requires applicants for membership to have "owned a real estate business" for at least six months prior to application;

b. maintained a bylaw providing that applicants who satisfy all other conditions of membership cannot become members unless they also receive an affirmative vote for admission from two-thirds of the FMLS members who choose to vote on the question;

c. maintained a bylaw that requires a member to agree that neither the member's firm nor any one in the member's firm join any multiple listing service or other real estate information exchange service that competes with FMLS;

d. maintained a bylaw that prohibits publication on the FMLS of information relating to any property offered for sale unless the seller has first agreed to grant the listing broker an exclusive right to sell listing; and

e. maintained a policy that, as a condition of membership in the FMLS, an applicant agree that neither the applicant's firm nor any one in the applicant's firm will own or operate a business that competes with real estate brokerage by, for example, assisting homeowners to market their homes without the traditional full array of brokerage services.

Par. 12. The purposes, effects, tendency or capacity, of the combination or conspiracy alleged in paragraph 9 above and the policies, acts or practices of the FMLS described in paragraphs 10 and 11 above, have been and are to restrain competition unreasonably in one or more of the following ways, among others:

a. restraining or deterring the entry of new brokerage firms, and of new joint ventures or shared brokerage or multiple listing services, in competition with the FMLS multiple listing service;

b. limiting consumers' ability to choose among a variety of brokerage firms competing on the basis of price, contract terms and services;

c. restraining competition among brokerage firms based on willingness to offer or accept different contract terms that may be attractive and beneficial to consumers, such as terms that allow the property owner to pay a reduced commission or no commission if the owner sells the property through means alternative to a broker's services;

d. limiting the ability of consumers to negotiate lower prices for brokerage services or brokerage contract terms that may be more advantageous for them than an exclusive right to sell listing; and

e. limiting the ability of residential property sellers to compete with real estate brokers in locating purchasers.

Par. 13. The policies, acts, practices, and combinations or conspiracies described above constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade

Commission Act, 15 U.S.C. 45. The alleged acts and practices, or the effects thereof, are continuing in nature and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the Florence Multiple Listing Service, Inc. ("FMLS"), and FMLS having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

FMLS, its duly authorized officer, its attorney, and counsel for the Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all of the jurisdictional facts set forth in the aforesaid complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedures prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. FMLS is organized, existing, and doing business under and by virtue of the laws of the State of South Carolina, with its offices and principal place of business located at 121 South Warley Street, in the City of Florence, State of South Carolina.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

Definitions

For the purposes of this order, the following definitions shall apply:

1. *"Multiple listing service"* shall mean a clearinghouse through which members' real estate brokerage firms exchange information on listings of real estate properties and share sales commissions with members who locate purchasers.

2. *"Listing"* shall mean any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

3. *"Exclusive agency listing"* shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property at an agreed commission, but reserves the right to sell the property personally to a direct purchaser (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed to the agent broker.

4. *"FMLS"* shall mean the Florence Multiple Listing Service, Inc. and its successors, assigns, officers, directors, committees, agents, representatives, members or employees.

I.

It is ordered, That respondent FMLS, directly, indirectly or through any device, in or in connection with the operation of a multiple listing service in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, shall cease and desist from:

(A) Adopting, maintaining or enforcing any bylaw, rule, regulation, policy, agreement or understanding, or taking any other action that has the purpose or effect of:

(1) Conditioning membership in FMLS or use of its multiple listing service on the length of time any applicant has owned, operated or maintained a real estate brokerage firm or other business;

(2) Requiring as a condition of FMLS membership or use of its multiple listing service that applicants who satisfy FMLS's other conditions of membership receive the approval by vote of any portion of FMLS members; or

(3) Conditioning membership in FMLS or use of its multiple listing service on any person's refraining or withdrawing from ownership, operation or other association with any lawful business.

(B) Forbidding publication through respondent FMLS's multiple listing service of any exclusive agency listing, or restricting such publication in any way other than by requiring designation of the listing as one granting an exclusive agency or by imposing terms applicable to all listings accepted for publication by the FMLS multiple listing service.

II.

It is further ordered, That FMLS shall:

(A) Within ninety (90) days after this order becomes final, amend its policies, bylaws, guidelines, rules and regulations, and any other of its instructive or suggestive materials to conform to the provisions of this order.

(B) For a period of five (5) years after this order becomes final:

(1) provide to any applicant who has been denied membership prompt and clear written notice of the denial, specifying the membership requirements not met and explaining in what manner the requirements are not met; and

(2) maintain in one separate file, segregated by the names of the applicants, all documents and correspondence that discuss, refer, or relate to any denied or approved application.

(C) For a period of three (3) years after this order becomes final furnish promptly, by first-class mail, a copy of the announcement in the form shown in Appendix A to any person who inquires about, or who submits an application for, membership in the FMLS.

(D) For a period of three (3) years after this order becomes final furnish promptly, by first-class mail, a copy of this order to any person who requests a copy.

III.

It is further ordered, That FMLS shall:

(A) Within thirty (30) days after this order becomes final, mail an announcement in the form shown in Appendix A, and a copy of the Complaint and Decision and Order to each member of FMLS.

(B) Within ninety (90) days after this order becomes final, submit a written report to the Federal Trade Commission setting forth in detail the manner and form in which FMLS has complied and is complying with this order.

(C) Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in FMLS, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any change in its incorporation that may affect compliance obligations arising out of this order.

Commissioner Bailey not participating.

APPENDIX A

ANNOUNCEMENT

As you may be aware, the Florence Multiple Listing Service, Inc. ("FMLS") has entered into a consent agreement with the Federal Trade Commission that has now become final. Acceptance of this agreement is for settlement purposes and does not constitute an admission that the FMLS has violated the law. The following is a brief summary of the provisions of the order issued pursuant to the consent agreement:

1. Eligibility for membership: The FMLS no longer requires, as a condition of membership, that a broker have owned and operated a business for a six-month period or any other time period. In addition, the FMLS no longer requires that any applicant or member who satisfies FMLS's other conditions of membership receive the approval by vote of any portion of FMLS members. Specific eligibility or membership requirements are set forth in official FMLS bylaws and policies. If any membership application is denied, the FMLS promptly will provide to the applicant a written explanation of the specific reasons for the denial.

2. Property listings that limit or differ from an exclusive right to sell arrangement: The FMLS will not prohibit members from entering exclusive agency listings—listings in which the broker and owner contract that the owner will owe a reduced commission or no commission to the agent broker if the owner locates the purchaser entirely independent of the services of any real estate broker. The FMLS will publish all listings of this type but may give notice that the listing is an exclusive agency listing rather than an exclusive right to sell listing.

3. Broker's development of or participation in organizations, services, businesses or ventures that compete with one another or with the MLS: The FMLS will not prohibit members from operating or joining any lawful business.

The FTC does not endorse any practice of the FMLS. For more specific information, you should refer to the FTC order itself. [A copy of the order is attached.][1]

President

Florence Multiple Listing
Service, Inc.

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[1] The sentence enclosed in brackets is required to be included in this Announcement only when the Announcement is sent to members of respondent Florence Multiple Listing Service as required by Part III(A) of the proposed order to which this Announcement is attached as an appendix.

IN THE MATTER OF

NEC HOME ELECTRONICS (U.S.A.), INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3229. Complaint, May 11, 1988—Decision, May 11, 1988

This consent order requires, among other things, a Delaware computer corporation, with its principal office in Wood Dale, Ill., to provide consumer redress and to contact each consumer who purchased a 32K board. The consent order also prohibits the respondent from falsely claiming that any of its computer hardware products currently has a stated memory capacity or other capability and from claiming that purchasers of its products have access to a stated memory capacity or other capability, unless the respondent has substantiation for the claim.

Appearances

For the Commission: *Jock K. Chung.*

For the respondent: *William Blumenthal* and *D.E. Rosenthal, Sutherland, Asbill & Brennan,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that NEC Home Electronics (U.S.A.), Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. For the purposes of this complaint, the following definition shall apply:

1. *"RAM"* means random access memory, and refers to the memory capacity of a computer. RAM is measured in small, basic units of storage or memory called "bytes" or in K bytes (K = 1024 bytes).

PAR. 2. NEC Home Electronics (U.S.A.), Inc., is a Delaware corporation with its principal office or place of business at 1255 Michael Drive, Wood Dale, Illinois.

PAR. 3. Respondent imports, advertises, offers for sale and sells computer hardware and software products and accessories, including the NEC PC-8000 Series microcomputer system.

PAR. 4. From 1981 to 1984, respondent imported, advertised, offered for sale, sold and distributed the NEC PC-8001A microcomputer, the NEC PC-8012A input/output ("I/O") Unit and PC-8012A-02 32K

RAM memory boards as accessories to the I/O Units. During the above time period, respondent distributed and sold said microcomputer, I/O unit, and memory boards, as well as other PC–8000 Series accessories and related equipment, from its principal place of business to distributors, retailers and, ultimately, purchasers located in various states of the United States.

Par. 5. Respondent maintains, and has maintained, a substantial course of business, including the acts and practices set forth herein, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

Par. 6. In connection with the marketing of computer products, respondent has disseminated and now disseminates advertisements and promotional material for the purpose of promoting the sale of its products.

Par. 7. Typical statements in said advertisements and promotional materials, but not necessarily inclusive thereof, are found in the promotional materials attached hereto as Exhibits A and B. Among other things, these promotional materials contain the following unqualified descriptions of the RAM capacity for the PC–8001A microcomputer and the PC–8012A I/O Unit:

(a) PC–8001A: "RAM - 32K Bytes (expandable to 160K Bytes with PC–8012A I/O Unit);" and

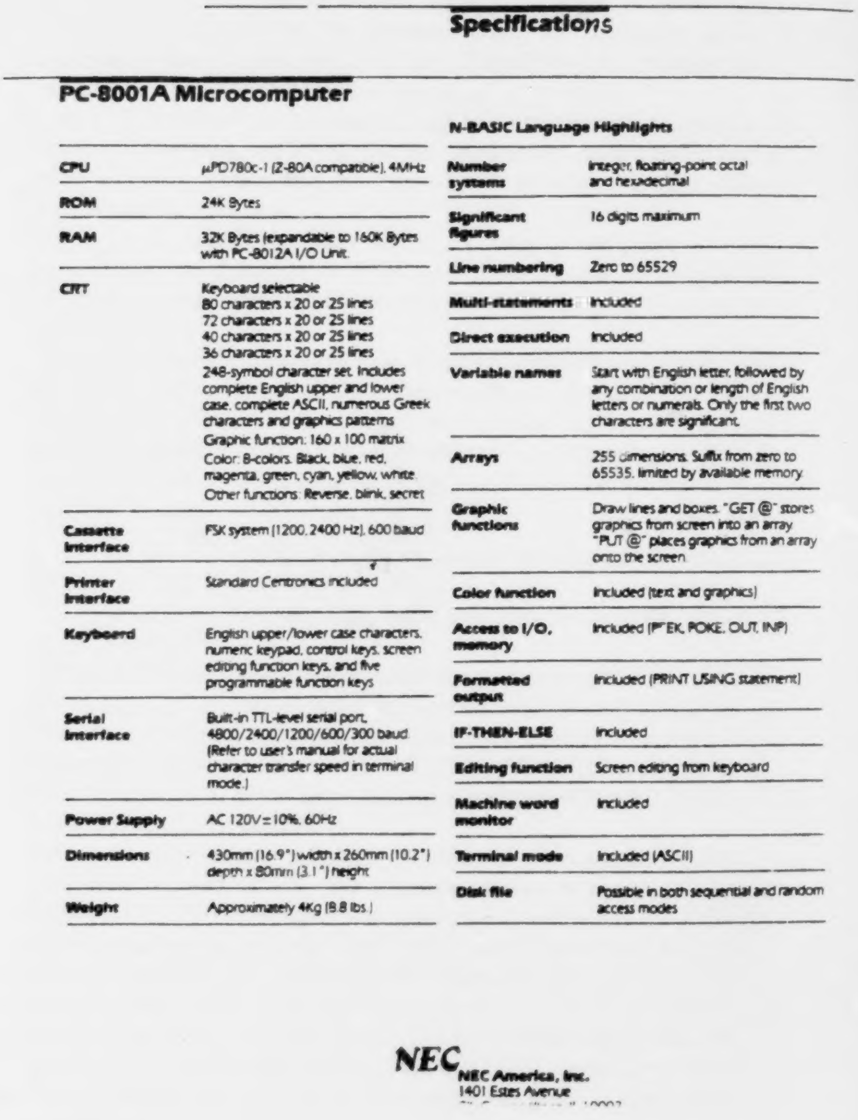
(b) PC–8012A I/O Unit: "32K RAM (expandable to 128K with additional boards)."

Par. 8. Through the use of the statements referred to in paragraph seven and others, respondent has represented, directly or by implication, that the average person, without any special expertise, could expand the memory capacity (RAM) of the PC–8001A microcomputer from 32K bytes to 160K bytes with the addition of the PC–8012A I/O Unit and memory boards.

Par. 9. In truth and in fact, at the time of the dissemination of the foregoing representation, the average person, without any special expertise, could not expand the memory capacity (RAM) of the PC–8001A microcomputer from 32K bytes to 160K bytes with the addition of the PC–8012A I/O Unit and memory boards, because only a person who was a computer programmer or who had access to a sophisticated software operating system, which has never been made available for sale in the United States, could accomplish this expansion. Therefore, the representation referred to in paragraph eight was and is false and misleading.

Par. 10. The acts and practices of respondent as alleged in this complaint constitute unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A



Specifications

PC-8001A Microcomputer

CPU	μPD780c-1 (Z-80A compatible), 4MHz
ROM	24K Bytes
RAM	32K Bytes (expandable to 160K Bytes with PC-8012A I/O Unit.
CRT	Keyboard selectable 80 characters x 20 or 25 lines 72 characters x 20 or 25 lines 40 characters x 20 or 25 lines 36 characters x 20 or 25 lines 248-symbol character set. Includes complete English upper and lower case, complete ASCII, numerous Greek characters and graphics patterns Graphic function: 160 x 100 matrix Color: 8-colors. Black, blue, red, magenta, green, cyan, yellow, white. Other functions: Reverse, blink, secret
Cassette Interface	FSK system (1200, 2400 Hz), 600 baud
Printer Interface	Standard Centronics included
Keyboard	English upper/lower case characters, numeric keypad, control keys, screen editing function keys, and five programmable function keys
Serial Interface	Built-in TTL-level serial port, 4800/2400/1200/600/300 baud (Refer to user's manual for actual character transfer speed in terminal mode.)
Power Supply	AC 120V±10%, 60Hz
Dimensions	430mm (16.9") width x 260mm (10.2") depth x 80mm (3.1") height
Weight	Approximately 4Kg (8.8 lbs.)

N-BASIC Language Highlights

Number systems	Integer, floating-point octal and hexadecimal
Significant figures	16 digits maximum
Line numbering	Zero to 65529
Multi-statements	Included
Direct execution	Included
Variable names	Start with English letter, followed by any combination or length of English letters or numerals. Only the first two characters are significant.
Arrays	255 dimensions. Suffix from zero to 65535, limited by available memory.
Graphic functions	Draw lines and boxes. "GET @" stores graphics from screen into an array. "PUT @" places graphics from an array onto the screen.
Color function	Included (text and graphics)
Access to I/O, memory	Included (PEEK, POKE, OUT, INP)
Formatted output	Included (PRINT USING statement)
IF-THEN-ELSE	Included
Editing function	Screen editing from keyboard
Machine word monitor	Included
Terminal mode	Included (ASCII)
Disk file	Possible in both sequential and random access modes

NEC NEC America, Inc.
1401 Estes Avenue

Complaint

EXHIBIT B

Specifications

PC-8012A I/O unit

The PC-8012A I/O unit is designed to expand the memory capacity of the PC-8001A microcomputer, and to accommodate interfaces and peripherals.

ROM	2K PROM area (chips are optional)
RAM	32K RAM (expandable to 128K with additional boards)
FDC I/O port	(direct connection for the PC-8031A disk drive)
Interrupt control circuitry	8 priority levels implemented, 16 possible. (Real-time interrupt generating capability)
Expansion	7 slots available for expansion boards
Power supply	115v AC ±10%, 60Hz
Power consumption	15w (for rated load)
Operating temperature	0°C-35°C (32°F-95°F)
Operating humidity	20%-80% (with no condensation)
Storage temperature	−15°C-60°C (5°F-140°F)
Dimensions	430mm (17½") width x 320mm (12⅞") depth x 150mm (6") height
Weight	7 kg (15½ lbs.)

NEC **NEC America, Inc.**
1401 Estes Avenue

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent NEC Home Electronics (U.S.A.), Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1255 Michael Drive, in the City of Wood Dale, State of Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

1. For the purposes of this order, all references to the "memory capacity" of a computer product shall include both its random access memory ("RAM") and its read only memory ("ROM").

I.

It is ordered, That respondent NEC Home Electronics (U.S.A.), Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the importation, manufacture, advertising, offering for sale, sale, or distribution of the PC–8000 Series microcomputer system, or any other computer hardware product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

a. That any such product has a stated memory capacity, or has any other directly related capacity or capability, unless such representation is true.

b. That it is possible for a purchaser of any of respondent's products to use or access any stated capacity or capability or perform any stated directly related function, unless, at the time such representation is made, respondent possesses and relies upon a reasonable basis for such representation.

c. That any such product will, in the future, have a stated memory capacity, or any other directly related capacity or capability, unless at the time such representation is made respondent possesses and relies upon a reasonable basis for said representation.

II.

It is further ordered, That:

a) Within ninety (90) days of the date of service on respondent of this order, respondent shall compile from its own records and those of its current and past distributors, dealerships and users' groups a current, up-to-date mailing list of each customer who purchased a PC–8012A–02 32K RAM Board(s) during the time period January 1, 1981 to December 31, 1984. If respondent does not possess or have access to the required customer records, then it shall, within a reasonable period of time, mail a letter to each current and past distributor or dealership and each company-sanctioned NECHE users' group at their present or last known business address requesting these records and shall compile a mailing list of retail customers based on the information received.

b) Within thirty (30) days of compiling the mailing list mentioned above, respondent shall send by first class mail to each customer named on the mailing list compiled in accordance with the requirements of paragraph II.a), above, a dated letter, plus an enclosed postcard, in the form prescribed in Appendix A to this order. The letter shall bear the customer's name and address, as identified on the mailing list, and no information other than that required by this paragraph shall be included in or added to the letter or postcard, nor shall any other material be transmitted with the letter or postcard without the express written approval of Commission staff. In addition, the envelope shall state the customer's name and address and shall include the following statement, printed clearly and conspicuously in the lower, left-hand corner of the envelope: IMPORTANT INFORMATION INSIDE: REFUND OFFER

The required postcard shall be in the form and approximate same size as the one prescribed in Appendix A to this order. The postcard shall be postage-paid and contain respondent's address.

In the event that any of the above-mentioned letters are returned due to the inability of the post office to deliver or forward to the addressee, the respondent is ordered to compile a list of the names of all these addresses. If the respondent receives a 32K RAM board refund request from any customer whose name was on the mailing list but whose letter was returned as undelivered by the Post Office, then the respondent is ordered to complete a new mailing, in accordance with the provisions of this order, to the return address shown on the customer's purchase order or other correspondence. Respondent's obligation under this paragraph to complete a new mailing shall expire one year after service upon respondent of this order.

Pursuant to the requirements contained in the letter attached as Appendix A, and subject to any limitations listed below, respondent shall offer each customer named in the above-mentioned mailing list the following:

1. Respondent will remit to each customer who purchased PC-8012A-02 32K RAM board(s), a check calculated according to the following formula: If refund requests to NECHE for less than 100 RAM boards are made, then the customer will be given $150 per RAM board. If refund requests for more than 100 RAM boards are made, then the amount to be refunded will be calculated as follows:

$$\frac{\$15{,}000}{\text{number of RAM board refund requests received within one year of service of this order}} = \text{amount of refund per RAM board}$$

2. Respondent shall send out all checks within thirteen (13) months after service upon respondent of this order. For each customer whose

initial mailing was returned by the post office, but to whom respondent makes a subsequent mailing within one year after service upon respondent of this order, the redress check must be sent within thirty (30) days of respondent's receipt of the return postcard sent to that customer.

III.

It is further ordered, That respondent, its successors and assigns shall maintain accurate records of all materials that were relied upon by respondent in disseminating any representation covered by this order, as well as all materials and information used or relied upon in performing the redress obligations under Part II. of this order. With regard to the records used in performing the redress obligations, said records shall be retained for three years after service upon respondent of this order. With regard to the records relied upon in disseminating any representation covered by this order, such records shall be retained for three years from the date of respondent's last use of such representation. All of the above-mentioned records shall be made available to the Commission upon reasonable notice for inspection and copying.

IV.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

V.

It is further ordered, That respondent shall distribute a copy of this order to each of its operating divisions.

VI.

It is further ordered, That respondent shall, within one hundred and twenty (120) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with all requirements of this order except paragraph II hereof. On or before eighteen months after service upon respondent of this order, respondent shall file with the Commission a report, in writing, setting forth in detail the manner and form of its compliance with paragraph II of this order, said report to include, among other things, the number of purchasers to whom refund notices were delivered, the number of purchasers to whom refund checks were mailed, and the amount of each such refund check.

IN THE MATTER OF

SUN INDUSTRIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 & 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3230. Complaint, May 13, 1988—Decision, May 13, 1988

This consent order prohibits, among other things, a Jonesboro, AR., manufacturer and seller of tanning devices and related products from misrepresenting that the use of a tanning device does not pose a risk of any harmful side effects to users. The consent order also requires the respondent to include a warning statement in any advertisements or promotional materials used for its tanning devices.

Appearances

For the Commission: *Brinley H. Williams* and *Toby M. Levin.*

For the respondent: *Ray A. Goodwin, Goodwin, Hamilton & Moore,* Paragould, AR.

COMPLAINT

The Federal Trade Commission, having reason to believe that Sun Industries, Inc., a corporation, ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent is an Arkansas corporation, with its office and principal place of business located at 2409 Industrial Drive, P.O. Box 2026, Jonesboro, Arkansas.

PAR. 2. Respondent has manufactured, advertised, offered for sale, sold and distributed tanning devices and related products for the artificial tanning of humans, including tanning beds, facial units, overhead lamp systems, and other products to the public. These tanning devices are marketed under such trade names as SunTana Sun-System.

PAR. 3. The acts or practices of respondent alleged in this complaint have been in or affecting commerce.

PAR. 4. Respondent has disseminated and caused the dissemination of advertisements and promotional materials for its tanning devices published in magazines and broadcasted on television across state lines, and disseminated in product brochures and other sales literature directly to consumers or to distributors for display or distribution to consumers. Typical of respondent's advertisements, but not necessarily all - inclusive thereof, are the attached Exhibits A through G. The aforesaid advertisements contain the following statements or depictions:

1. "Our SunTana SunSystem guarantees you a glorious, radiant tan that you can keep all year long. A tan you achieve with soft, comfortable and SAFE U.V.A. light and without all the burning, peeling and flaking you get in natural sunlight." (Emphasis in original) (Exhibit A)

2. "[F]or efficient tanning year 'round without the harmful side effects often associated with natural sunlight." (Exhibit B)

3. "There has never been to our knowledge a case of skin cancer reported to have been caused by use of a SunTana sunbed." (Exhibit C)

4. "There's no harsh glare, so no goggles or eye shades are necessary!" (Exhibit D)

5. "You can lie in luxury on our special SunBed while our SAFE built in lamps make you beautifully brown!" (Emphasis in original) (Exhibit E)

6. "Introducing the year 'round tan by SunTana, makers of the remarkable, new European-style Sunmate. Enjoy the luxury and convenience of a proven and safe UVA tanning system. Achieve a magnificent, golden tan without burning." (Text of TV advertisement, Exhibit F).

7. "The days of lying outdoors in the heat, enduring the discomforts and damaging rays of sunlight are being replaced by proven, non-burning* SunTana SunSystems. (* When exposure times are followed properly.)" (Exhibit G)

PAR. 5. Through the use of the statements and depictions referred to in paragraph four and others in advertisements not specifically set forth herein, respondent has represented, directly or by implication, that:

1. Use of respondent's tanning devices cannot increase the risk of developing skin cancer.

2. Respondent's tanning devices can be safely used without protective eyewear.

3. Respondent's tanning devices can be used without the risk of any harmful side effect associated with the sun.

PAR. 6. In truth and in fact:

1. Use of respondent's tanning devices can increase the risk of developing skin cancer.

2. Respondent's tanning devices cannot be safely used without protective eyewear.

3. Respondent's tanning devices cannot be used without the risk of any harmful side effect associated with the sun.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

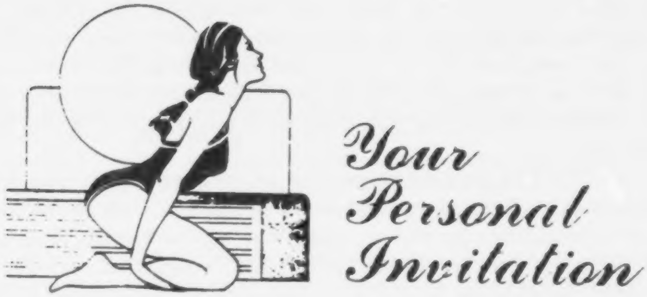
PAR. 7. Through the use of the representations referred to in paragraph five and others not specifically set forth herein, respondent has represented, directly or by implication, that at the time it made the representations it possessed and relied upon a reasonable basis consisting of competent and reliable scientific evidence for said representations.

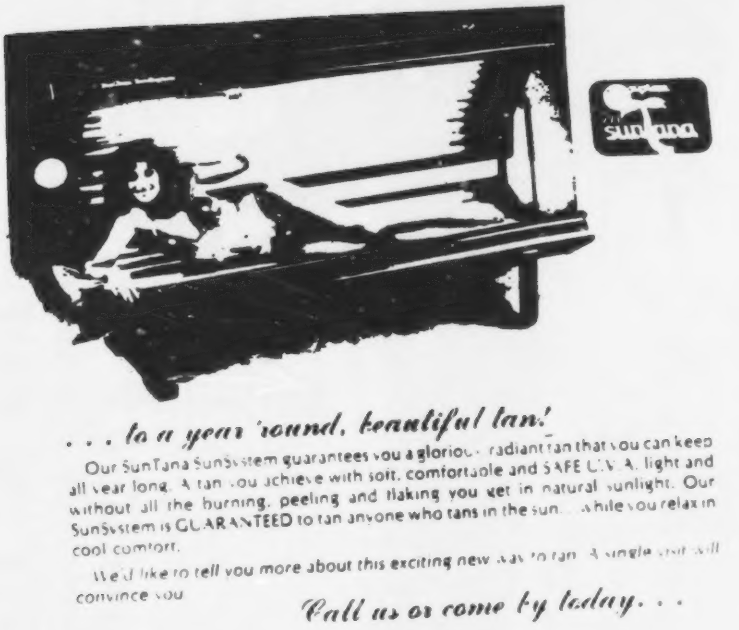
PAR. 8. In truth and in fact, at the time it made the representation respondent did not possess and rely upon a reasonable basis for making such representations. Therefore, respondent's representation as set forth in paragraph seven was and is false and misleading.

PAR. 9. In the advertising and sale of its tanning devices, respondent has used terms such as "safe" and "no harmful side effects" without disclosing that the use of such devices poses the risk of eye injury and the increased risk of skin cancer and skin aging. These facts would be material to consumers. The failure to disclose these facts, in light of the representations made as alleged in paragraph five, is a deceptive practice.

PAR. 10. The acts and practices of respondent as alleged in this complaint, and the placement in the hands of others of the means and instrumentalities by and through which others may have used said acts and practices, constitute unfair and deceptive acts or practices in or affecting commerce and the dissemination of false advertisements in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A


Your
Personal
Invitation



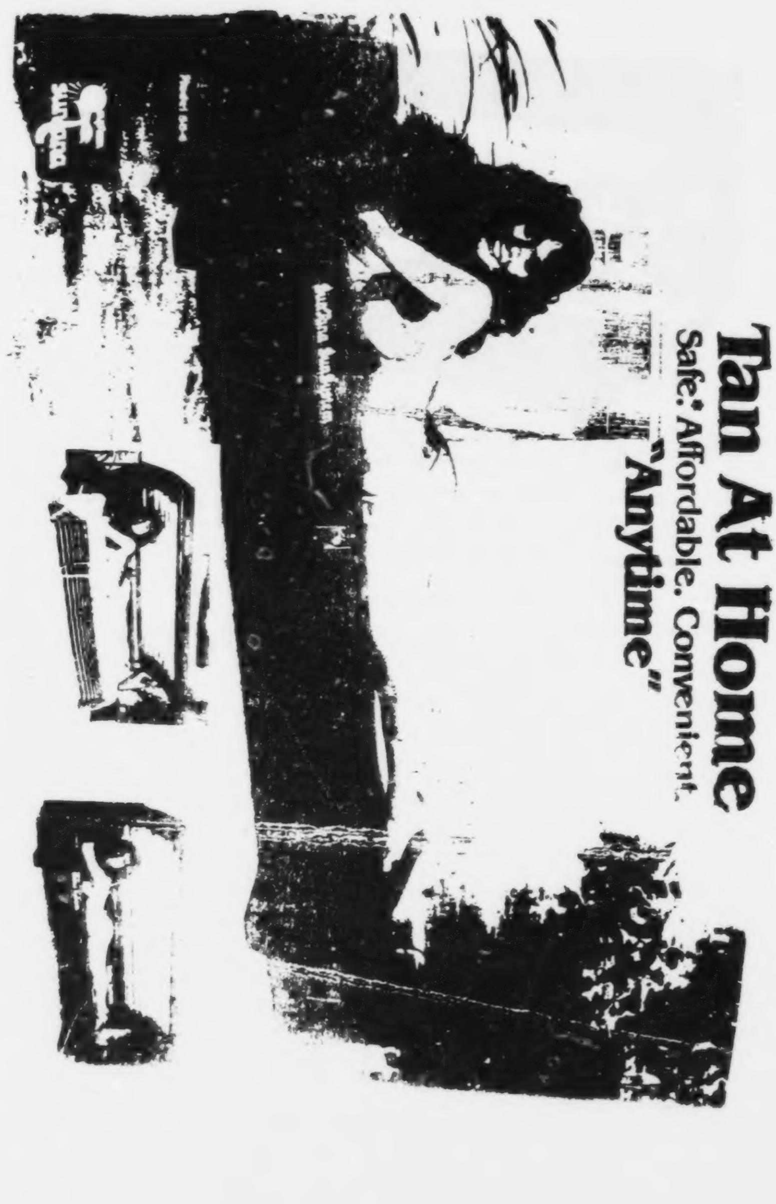
. . . to a year 'round, beautiful tan!

Our SunTana SunSystem guarantees you a glorious, radiant tan that you can keep all year long. A tan you achieve with soft, comfortable and SAFE U.V.A. light and without all the burning, peeling and flaking you get in natural sunlight. Our SunSystem is GUARANTEED to tan anyone who tans in the sun . . . while you relax in cool comfort.

We'd like to tell you more about this exciting new way to tan. A single visit will convince you.

Call us or come by today. . .

EXHIBIT B


Tan At Home
Safe.* Affordable. Convenient.
"Anytime"

COMMON QUESTIONS ABOUT UVA SUNTANNING

Q. "I have never heard of the tanning machine . . . is this something new?"

A NO. Dermatologists for several years have used UV light for therapy. Since its inception, the suntanning unit has become quite common in Europe for efficient tanning year 'round without the harmful side effects often associated with natural sunlight. Last year, alone over 90,000 were sold in Europe valued at over 100 million dollars.

Q. "Can the SunTana SunSystem burn?"

A When exposure times are used properly, you cannot burn with the SunSystem. Our SunSystem artificially duplicates the [illegible] ount of UV light to stimulate the melanin in the skin. Once stimulated, the UVA acts upon the melanin to produce a rich, deep tan. At the same time, the carefully controlled temperature of the system helps to promote the tanning process and prevents dry skin.

Q. "Should suntan cremes, lotions, or oils be used with the SunSystem?"

A Since the long wavelength UVA of the SunSystem will not burn your skin, it is recommended that you do not use any cremes, oils, or lotions during tanning sessions. Most of these contain sunscreens and will provide a physical barrier on the skin and prevent the UVA from penetrating and inducing a tan. Equally important, many facial makeups have oil bases and should be removed prior to a session. It is recommended that, following a tanning session, a skin moisturizer be applied. This promotes a smoother, more even looking tan and will promote the process.

WE CERTIFY THAT THE PRODUCT COMPLIES WITH THE FEDERAL PERFORMANCE STANDARD [illegible]
EXCEPT WITH RESPECT TO THOSE CHARACTERISTICS
AUTHORIZED BY VARIANCE NO [illegible]
EFFECTIVE MAR 17 1981

[illegible]

Q. "How do the SunBeds differ from the tanning booths?"

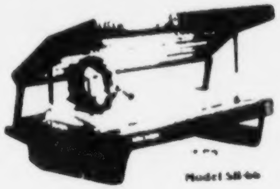
A There is a great deal of difference. The majority of booths utilize the UV lamp that emits a very large and strong dose of "B" light that falls in the 280-315 nanometer range. The treatments are usually very short — just a few minutes (2 to 3 minutes). The reason is that the rays are so strong that you cannot tolerate the heat or the harsh UVB exposure and there's a possibility that you would burn. In summary, the UVB system has been popular, but medical authorities are quite concerned about the long term effects of this type of radiation.

Q. "What are the SunBed measurements?"

A The contour curved SunBed measures 85 inches long, just 28¾ inches wide, and stands only 14 inches tall. The system utilizes eight (8) 6-ft. lamps, operates on standard 115-volt household current, and weighs approximately 150 pounds. Actual cost of operation is minimal — about $3 to $4 per month.

Q. "Can I add the optional top unit at a later date?"

A YES. The SB-6 is designed so the top unit can be added to provide you a complete SunSystem. Together, the system utilizes sixteen (16) lamps and operates on standard 115 volt household current. The SB-6 or SB-66 makes an excellent tanning unit for the home.



Model SB-66

Q. "Do you need to wear any type of eye protection?"

A Since the Bureau of Radiological Health requires the in the United States, we provide goggles with each our SunSystems and advise using them whenever taking a tanning session.

Q. "Is UVA as dependable as the various claims hav indicated?"

A Our answer is "YES." A few medical authorities ha indicated some UVA lamps on the market will n result in chronic changes such as aging or skin canc even with repeated and prolonged usage over a nu ber of years. In addition, several skin types will show skin tone change after the first or second exposure

Q. "How much time is required for a treatment, and h often must I use the SunSystem?"

A A tan is relative to each individual and treatme length varies with each person. W [illegible] irst ten (1 sessions consecutively. Fair complexion individua need to begin with 15 minutes for the first and seco session and gradually increase to 30 minutes for th 8th through the 10th session. For average complexi individuals, we suggest 20 minutes for first and seco session and 30 minutes for subsequent sessions. F dark complexion individuals who already have a d veloped tan, 30 minute sessions are alright. Once y have reached a desired tan, one or two sessions eve two weeks will keep your tan at the desired intensi

SunTana SunSystem
P.O. Box 2026
Jonesboro, AR 72401
Toll Free 800-643-0086

EXHIBIT C

Q. **Does use of the SunSystem cause skin cancer?**

A. There has never been to our knowledge a case of skin cancer reported to have been caused by use of a SunTana sunbed. In the ultraviolet light spectrum of sunlight, there is ultraviolet light in what is called UVB wavelengths, which burn the skin and in different, less dangerous wavelengths called UVA. Early UV tanning devices emitted light in UVB wavelengths and did sometimes cause burns. SunTana's lamps emit ultraviolet light in the UVB range only to the extent of 2%, the bulk of the emissions being in the UVA wavelength range. UVA lamps will tan the skin and when used as directed will not burn the skin as the UVB lamps do.

EXHIBIT D

SUGGESTED RADIO COPY

60 SECOND SUNTANNING SPOT

ANNOUNCER: Remember how hard you worked last summer . . . all the long hours you put in . . . all the glare from the hot sun and the sweat trickling down your back . . . Just to get a suntan??!!

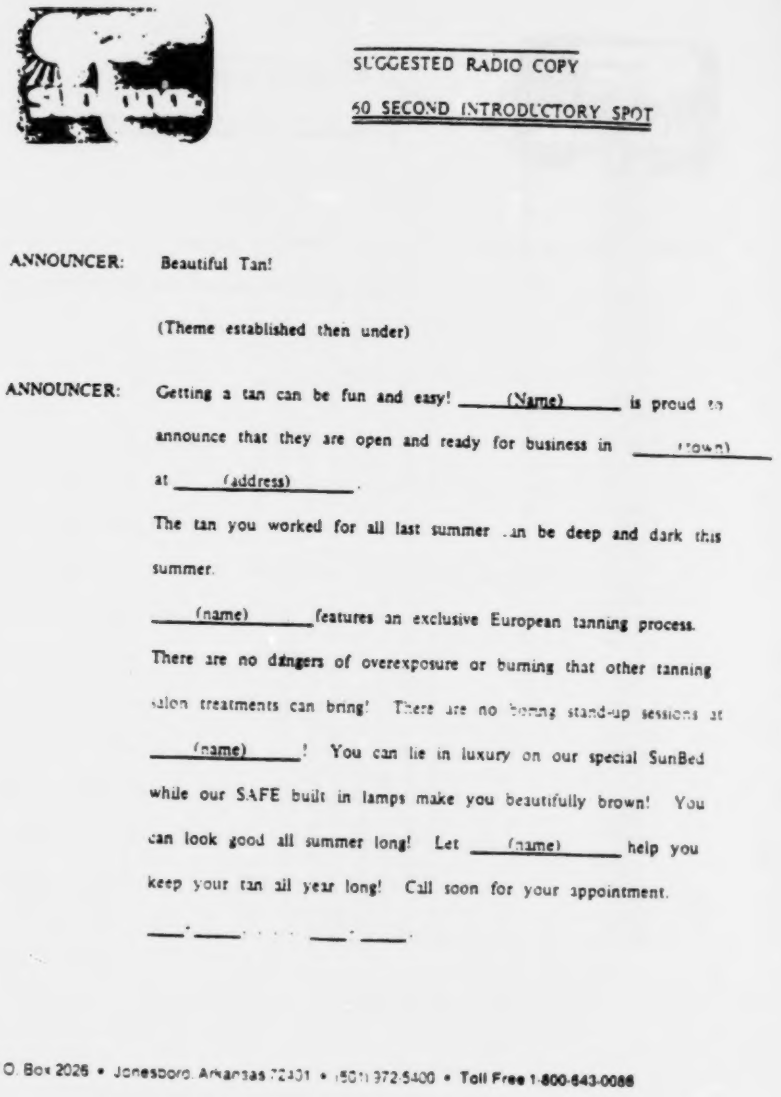
(Music: Upbeat and Catchy)

ANNOUNCER: Now getting a suntan can be fun at ____(name)____! You can get the best of the sun, without the bother! With our exclusive European Tanning Process, you can relax on our special SunBed, even read a book, while you receive a rich golden tan! There's no harsh glare, so no goggles or eye shades are necessary! And quite cooling fans keep the temperatures paradise-perfect! At ____(name)____, we can give you something the sun can't . . . . . A Guarantee! You are guaranteed a darker skin tone or your money back! Pale faces are our specialty!! And there's absolutely no burning! Go to where the sun always shines, where you can get the best of the sun, without bother! A suntan is fun at ____(name)____! And that's a guarantee! Call 000-0000 for your place in the sun today!!!! ____(name)____, ____(town)____!!

(Music up to completion)

P.O. Box 2026 • Jonesboro Arkansas 72401 • (501) 972-5400 • Toll Free 1-800-643-0086

EXHIBIT E



SUGGESTED RADIO COPY

60 SECOND INTRODUCTORY SPOT

ANNOUNCER: Beautiful Tan!

(Theme established then under)

ANNOUNCER: Getting a tan can be fun and easy! ____(Name)____ is proud to announce that they are open and ready for business in ____(town)____ at ____(address)____.

The tan you worked for all last summer can be deep and dark this summer.

____(name)____ features an exclusive European tanning process. There are no dangers of overexposure or burning that other tanning salon treatments can bring! There are no boring stand-up sessions at ____(name)____! You can lie in luxury on our special SunBed while our SAFE built in lamps make you beautifully brown! You can look good all summer long! Let ____(name)____ help you keep your tan all year long! Call soon for your appointment.

____-_____ . . . . ____-_____.

P.O. Box 2026 • Jonesboro, Arkansas 72401 • (501) 972-5400 • **Toll Free 1-800-643-0086**

EXHIBIT F

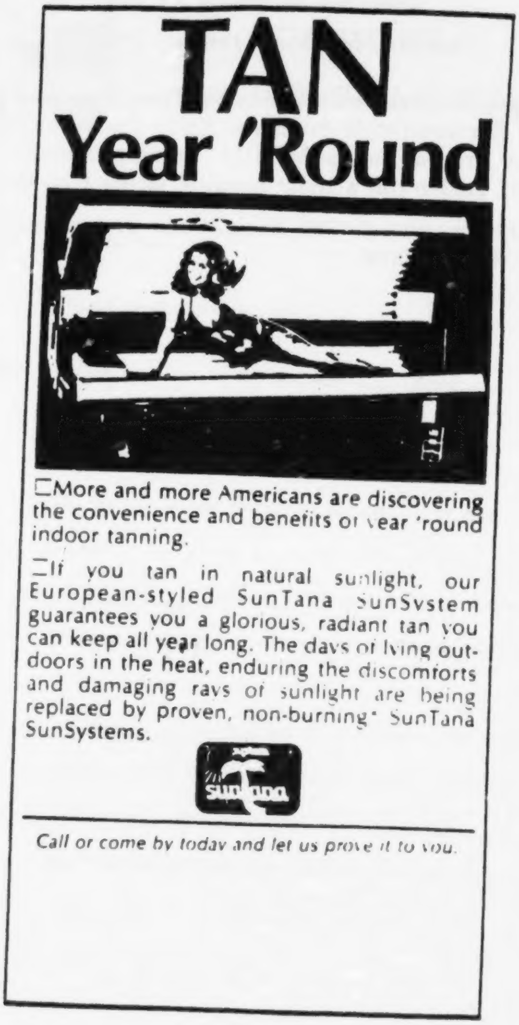
SunTana 30 Second TV Spot

Herget Marketing, January 20, 1984

Introducing the year 'round tan by SunTana, makers of the remarkable, new, European-style Sunmate. Enjoy the luxury and convenience of a proven and safe UVA tanning system. Achieve a magnificent, golden tan without burning. Order your Sunmate now.

Incredibly low price of $795. Freight and shipping extra. Toll-free number 1-800-643-0086.

EXHIBIT G



TAN
Year 'Round

☐More and more Americans are discovering the convenience and benefits of year 'round indoor tanning.

☐If you tan in natural sunlight, our European-styled SunTana SunSystem guarantees you a glorious, radiant tan you can keep all year long. The days of lying outdoors in the heat, enduring the discomforts and damaging rays of sunlight are being replaced by proven, non-burning* SunTana SunSystems.

suntana

Call or come by today and let us prove it to you.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Sun Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arkansas. Sun Industries has its offices and principal place of business at 2409 Industrial Drive, P.O. Box 2026, Jonesboro, Arkansas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

DEFINITION

For the purpose of this order, the following definition shall apply:

"*Tanning device*" means any product designed to incorporate one or more ultraviolet lamps and intended for irradiation of any part of the living human body by ultraviolet radiation to induce skin tanning.

I.

It is ordered, That respondent Sun Industries, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any tanning device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication, through the use of the word safe or any other word or words of similar meaning, that use of any such tanning device does not pose a risk of any harmful side effect to the user.

II.

It is further ordered, That respondent Sun Industries, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any tanning device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication, that:

a. Use of any such device does not increase the risk of developing skin cancer; and

b. Protective eye wear is not needed when using any such device.

III.

It is further ordered, That for one year after the date of service of this order respondent Sun Industries, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any tanning device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to prominently disclose in any print advertisement, film, video tape or any other promotional material the following statement:

> NOTICE - Read the mandatory FDA warning label found on every tanning machine for important information on potential eye injury, skin cancer, skin aging and photosensitive reactions.

The above-required language shall be included in printed material printed in a typeface and color that are clear and conspicuous, and, in multipage documents, shall appear on the cover or first page; and in any film, video tape, or slide promotional material shall be included either orally or visually in a manner designed to ensure clarity and prominence; provided, further, that nothing contrary to, inconsistent with, or in mitigation of the above-required statement shall be used in any advertising or promotional materials.

IV.

It is further ordered, That commencing one year after the date of service of this order respondent Sun Industries, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary division or other device, in connection with the advertising, offering for sale, sale or distribution of any tanning device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making in any print advertisement, film, video tape or any other promotional material any representation, directly or by implication, that the tanning device is safe or safer than other devices or methods of tanning or that the device has health benefits unless the following statement is given:

> NOTICE - Read the mandatory FDA warning label found on every tanning machine for important information on potential eye injury, skin cancer, skin aging and photosensitive reactions.

The above-required language shall be included in printed material printed in a typeface and color that are clear and conspicuous, and, in multipage documents, shall appear on the cover or first page; and in any film, video tape, or slide promotional material shall be included either orally or visually in a manner designed to ensure clarity and prominence; provided, further, that nothing contrary to, inconsistent with, or in mitigation of the above-required statement shall be used in any advertising or promotional materials.

V.

It is further ordered, That respondent Sun Industries, Inc., its successors and assigns and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of any product for personal or household use, in or affecting commerce, as "commerce" is defined in the Federal Trade

Commission Act, do forthwith cease and desist from making, directly or by implication, any health or safety representation unless, at the time of such representation, respondent possesses and relies upon a reasonable basis for each such representation, consisting of reliable and competent scientific evidence that substantiates such representation; provided however, that to the extent such evidence of a reasonable basis consists of scientific or professional tests, analyses, research, studies or any other evidence based on expertise of professionals in the relevant area, such evidence shall be "reliable and competent" only if those tests, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, and using procedures generally accepted in the profession to yield accurate and reliable results.

VI.

It is further ordered, That respondent shall distribute a copy of this order to each current officer, employee, agent and or representative having sales or promotional responsibilities with respect to the subject matter of this order, and to each dealer, distributor, and purchaser or lessee for commercial use, of its tanning devices (such as health clubs, tanning salons, beauty salons, catalogue houses, and tanning device retailers) known through existing company records to be in operation on the effective date of this order.

VII.

It is further ordered, That for three (3) years from the date that the representations to which they pertain are last disseminated, respondent, its successors and assigns shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials relied upon to substantiate any claim or representation covered by this order; and

B. All test reports, studies, surveys, or other materials in its possession or control or of which it has knowledge that contradict, qualify, or call into question such representation or the basis upon which respondent relied for such representation, including complaints from consumers.

VIII.

It is further ordered, That for ten (10) years after the date of service of this order respondent, its successors and assigns shall maintain for three (3) years from the last date of dissemination of the material a copy of each nonidentical form of promotional and training material disseminated by respondent and upon request make such material available to the Federal Trade Commission or its staff for inspection and copying.

IX.

It is further ordered, That for ten (10) years after the date of service of this order respondent, its successors and assigns shall maintain, for three (3) years and upon request make available to the Federal Trade Commission for inspection and copying records of the name and last known address of each dealer, distributor and purchaser or lessee for commercial use of respondent's sunlamp products.

X.

It is further ordered, That respondent, its successors and assigns shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

XI.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon it and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied or intends to comply with this order.

IN THE MATTER OF

OGILVY & MATHER INTERNATIONAL, INC.

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 & 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9149. Consent Order, Jan. 4, 1983—Modifying Order, May 24, 1988

The Federal Trade Commission has modified a portion of a 1983 consent order (101 FTC 1) with Ogilvy & Mather International, Inc., the advertising agency for Thompson Medical Co., Inc., the makers of the topically applied analgesic "Aspercreme", by making two modifications in accordance with paragraph eight of the consent order so that the Ogilvy order matches the language in the Thompson order.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On February 5, 1981, the Commission issued its complaint in this proceeding alleging that Thompson Medical Co., Inc. ("Thompson"), and its advertising agency, Ogilvy & Mather International, Inc. ("Ogilvy"), had made false and deceptive representations in advertising materials for Thompson's over-the-counter topically applied analgesic "Aspercreme" in violation of Section 5 of the FTC Act, 15 U.S.C. 45 ("Section 5"). On October 4, 1982, the Commission accepted from Ogilvy an "Agreement Containing Consent Order to Cease and Desist" for public comment and on January 4, 1983, issued the negotiated consent order. The litigation against Thompson continued.

Paragraph 8 of the Ogilvy consent agreement specified that:

> 8. No part or provision of this Order shall become binding upon respondent until the effective date of a final order to cease and desist against Thompson Medical Company, Inc. or its successors or assigns. If a final order against Thompson Medical Company, Inc. in this proceeding contains a provision different from the provision that correspond [s] to the provision in Part I(A) of this Order or contains a definition of "competent and reliable scientific or medical evidence" that differs from Part II of this Order, then this Order shall be reopened for the sole purpose of conforming said provision or said definition in this Order with the corresponding provision or definition in the Thompson Medical Company, Inc. order. In the event that the Complaint in this matter against Thompson Medical Company, Inc. is dismissed in whole, then the Commission, upon the application of respondent, shall set aside this Order.

On November 24, 1984, the Commission issued a cease-and-desist order against Thompson. 104 FTC 648. Thompson petitioned for review of the order, which was affirmed by the Court of Appeals. 791 F.2d 189 (D.C. Cir. 1986). Thompson then petitioned for *certiorari*, and the Commission's order became final in early 1987 after the Supreme Court denied that petition. 107 S.Ct. 1289 (1987). Consistent with paragraph 8 of the Ogilvy consent agreement, the Commission's order against Ogilvy became effective at the same time as the *Thompson* order.

On November 17, 1987, Ogilvy filed a request that the Commission reopen this proceeding and modify the 1983 consent order against Ogilvy. The request cites paragraph 8 of the "Agreement Containing Consent Order to Cease and Desist" ("consent agreement") as justification for certain modifications to Parts IA and II of the order and also asserts that changed conditions of fact and law and the public interest justify modification of other parts of the order.

The Commission's order against Ogilvy comprises seven parts. Part I prohibits respondent from misrepresenting the ingredients of any drug product, from misrepresenting that any drug product is new or involves any new principle, and from misrepresenting any test or study of any drug product or the effectiveness of any drug product. Part II of the order prohibits certain effectiveness and side effect claims for any topically applied drug product unless the claims are substantiated. Parts III, IV, V and VII of the order impose recordkeeping requirements and mandate notification of the Commission concerning corporate changes and distribution of copies of the order and require submission of compliance reports. Part VI of the order states that the order does not apply to three named corporate subsidiaries of Ogilvy.

Ogilvy first seeks modifications of Parts IA and II of the order, which it believes should be granted on the basis of paragraph 8 of its consent agreement, quoted above. The modification to Part IA would replace the current language banning use of the tradename "Aspercreme" for a product that does not contain therapeutically significant quantities of aspirin with language permitting use of that tradename for such a product, provided the advertising and labeling using the tradename "clearly and prominently disclose that the product does not contain aspirin." The modified language would include explicit directions concerning the permissible disclosures for television, radio and print advertising and for labels. The requested modifications to Part IA of the order will conform a portion of the order against Ogilvy covered by paragraph 8 of Ogilvy's consent agreement to the parallel *Thompson* language, and the Commission agrees that the changes are justified.

Ogilvy also requests that the Commission modify to reflect the *Thompson* decree the language in Part II of the order requiring that clinical studies conform to the requirements set forth in 21 CFR 314 and 330. Ogilvy's proposed order would require clinical studies to conform to "acceptable designs and protocols." This change too will conform a portion of the *Ogilvy* order covered by paragraph 8 of the consent agreement to the parallel provision of the *Thompson* order, and the Commission agrees that it is justified.

Ogilvy further requests that Part VI of the order be modified. Part VI of the present order excepts from the scope of the decree "three subsidiary corporations wholly owned by respondent unless a product otherwise covered by the order is assigned or transferred from respondent to one" of them. Ogilvy seeks to except two additional subsidiaries from the scope of the order. One, Rolf Warner Rosenthal, Inc., was acquired after the order was issued and specializes in advertising of prescription drugs to health care professionals. The other, Euramerica, Inc., did not engage in advertising at the time the order was issued, but now performs some advertising activities. Ogilvy asserts that both subsidiaries are "independent" and that the "intent of Part VI is to exempt all independent Ogilvy subsidiaries." Request for Modification at 9.

Ogilvy asserts that its acquisition of Rolf Warner Rosenthal, Inc., and its conversion of Euramerica, Inc., to an advertising subsidiary constitute changed facts that under Section 5 require the Commission to reopen and modify the order. Nothing in the consent agreement and order suggests that the Commission's intent to exempt "independent" subsidiaries. Ogilvy has not suggested any other reason to construe the order this way, nor does it suggest what an "independent" subsidiary is under the terms of the order. Nothing in the consent agreement or the order compels the Commission to exempt additional subsidiaries of Ogilvy simply on a showing that they exist. The acquisition of Rolf Warner Rosenthal, Inc., and the conversion of Euramerica are not, therefore, changes of fact that require granting Ogilvy's request for modification.

Absent a showing of changed fact or law, the Commission may modify its orders if it concludes that to do so would be in the public interest. To meet its burden in this respect, Ogilvy must show that if the two additional subsidiaries are not exempted from the order, it will sustain competitive harm that is greater than or different from the harm that it reasonably might have expected at the time it agreed to the consent order. *See, e.g., Damon Corp.*, 101 FTC 689 (1983) (show cause order). Ogilvy has not carried this burden. Indeed, it has shown only that whatever harm the two new subsidiaries will sustain is the same as that currently being suffered by the company itself. According to Ogilvy, that alleged harm stems principally from the fact that the *Ogilvy* order is less stringent than certain orders in subsequent and unrelated Commission cases against competing advertising agencies.

Ogilvy submitted an affidavit from its Chairman stating that current clients have "expressed concern over the breadth of Ogilvy's order" (Phillips Aff. ¶8) and, specifically, that "the breadth of the order will chill Ogilvy's creative efforts . . . as Ogilvy seeks to avoid even the possibility of a civil penalty proceeding." Phillips Aff. ¶9. The company also has stated that the harm that would be suffered by the two new subsidiaries if the Commission refused to extend the current exemption would be the same as that being sustained by Ogilvy itself.

The Commission concludes that Ogilvy has provided no reason to treat the two subsidiaries differently from the company itself. Nor has Ogilvy shown that such harm as it has alleged is different from, or more severe than, it reasonably might have anticipated at the time the order issued. We therefore decline to grant the modification expanding the subsidiary exemption.

Ogilvy also seeks modification of several other portions of its order to conform it to the *Thompson* decree. These modifications are not covered by paragraph 8 of the consent agreement because they do not appear in the parts of the order to which that paragraph is expressly directed. Ogilvy argues that these modifications are justified based on the Commission's action in *Benton & Bowles, Inc.*, 82 FTC 1437 (1973), 102 FTC 1837 (1983). In that case, the Commission issued similar complaints against an advertiser, Sterling Drug Co., and Benton & Bowles, one of its advertising agencies. Benton & Bowles agreed to a consent order, but Sterling continued to litigate and ultimately prevailed with respect to some of the allegations. The Commission dismissed those portions of the *Sterling* complaint and then vacated the *Benton & Bowles* consent order because it had derived from the portions of the *Benton & Bowles* complaint that were the same as the portions dismissed in *Sterling*.

This part of the company's request for modification would effect the following changes in the order:

Part IC: Deletion of bans on certain claims concerning efficacy based on the newness of drug or newness of mechanical principles, leaving in effect ban on claims concerning efficacy based on new scientific principles, adding the limiting description "over-the-counter" to modify "drug" and revising the existing geographic limitation to conform to the *Thompson* language: *i.e.*, "available for purchase in the United States" rather than "nationally available for purchase;"

Parts IIC and D: Deletion of bans on certain claims concerning side effects;

Part IF: Deletion of ban on claims made without substantiation concerning the mode of action by which a drug treats a condition;

Parts IIA and B: Deletion of coverage in provision banning deceptive effectiveness claims of claims relating to a drug's ability to treat or relieve "any other disease or condition" in addition to "symptoms of any musculoskeletal disorder;

Parts IB and D: Deletion of redundant prohibitions concerning misrepresentations as to the presence of an ingredient and substitution of the combined provision in Part ID of the *Thompson* order; and

Part VII: Substituting the *Thompson* requirement for filing compliance reports within 60 days of service "and at such other times as the Commission may require" for the present requirement that they be filed within 60 days after the order becomes final and "annually thereafter for three years."

As in the Commission's decision vacating the *Benton & Bowles* order, the dismissal of certain allegations in the *Thompson* complaint is a change of law that requires modifying those parts of the order that relate to the complaint allegations that were dismissed. The Commission agrees, therefore, that the changes described above relating to Parts IC and IIC and D are appropriate.

The remaining modifications described above do not relate to complaint allegations that were dismissed, but rather, to allegations that resulted in less rigorous order provisions in the *Thompson* decree than those agreed to by Ogilvy. Although these modifications do not stem from dismissed complaint allegations, Ogilvy appears to argue that *Benton & Bowles* is controlling precedent. It also argues that "as a matter of fundamental fairness Ogilvy should not be punished more severely than the advertiser." Request for Modification at 20. We do not adopt either of these proffered justifications for the requested changes.

The Commission's action in *Benton & Bowles* does not compel us to conform the orders of advertising agencies and their advertisers except in the narrow circumstances in which the complaint allegations against the advertiser were replicated in the complaint against the agency, where the allegations in the advertiser's complaint were dismissed, and where the record showed no basis for imposing disparate relief on the two parties. We therefore decline to grant these modifications on the basis of that decision.

We also do not subscribe to the notion that "fundamental fairness" necessarily compels the Commission, as a general matter, to conform its orders against advertisers and their advertising agencies. Each respondent stands on its own, and the Commission may decide that it is appropriate to impose more stringent order provisions for either the advertiser or its agency. The only restriction is that the relief against any party must be reasonably related to the unlawful conduct found. *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611–13 (1946); *see also*

FTC v. *National Lead Co.*, 352 U.S. 419, 428–31 (1957); *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

Paragraph 8 of Ogilvy's consent agreement specifies two portions of its consent order that were to be modified to conform to any more lenient language that subsequently might be made applicable to Thompson. The company has not shown why, at this time, the Commission should ignore the expressly limited language in paragraph 8 and modify other provisions in the order absent a demonstration that the modifications are justified on grounds of changed fact or law or the public interest. As explained elsewhere in this order, the Commission has concluded that Ogilvy has not shown that the current order is causing it any harm that is different from or more severe than it reasonably could have anticipated when it signed the consent agreement. Therefore, we have decided to deny the company's request for these changes.

Finally, Ogilvy requests modification of the preamble to Part I of the order—language not covered by paragraph 8 of the consent agreement—to limit the scope of its coverage even more narrowly than the scope of the order against *Thompson*. The *Ogilvy* order applies to all "drugs." The *Thompson* order applies to all "OTC drugs." Ogilvy seeks to have this language modified to cover only "OTC topically applied analgesic drugs." It argues that this request is warranted because the coverage of the orders against two of the three advertising agencies in the Commission's recent "analgesics" cases[1] and the coverage of the order against Sterling Drug, one of the advertisers, were limited to "internal analgesic drugs."[2]

The Commission's decision to limit the orders in the "analgesics" cases relied on by Ogilvy is not a change of fact or law that would require modification of the scope of the *Ogilvy* order. The order against American Home Products Corp. and its advertising agency, C.T. Clyne, which covered a more narrow range of products, was issued in September, 1981, well before the *Ogilvy* consent order. The mere fact that the Commission issues different orders in cases against different companies at different times does not justify conforming earlier orders to those issued later. The Commission decides each matter on its own merits and structures the relief mandated to fit the circumstances.

The Commission determines the product coverage in a particular order based on a number of considerations related to the facts of each specific case such as the extent of the respondent's unlawful conduct, whether the respondent knew or should have known that its conduct was improper or unlawful and the perceived need for fencing-in relief. Here, Ogilvy consented to its order, including the present product coverage, at a time when it should have known that the product coverage in that order was broader than that contained in *American Home Products*. Some months after issuance of Ogilvy's consent order, the Commission issued its orders against Bristol-Myers, Sterling Drug and certain of their advertising agencies.

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[1] American Home Products Corp., 98 FTC 136 (1981); Bristol-Myers Co., 102 FTC 21 (1983); Sterling Drug, Inc., 102 FTC 395 (1983).

[2] Although the order against Sterling is limited to "internal analgesic drugs," the order against its advertising agency, Dancer-Fitzgerald-Sample ("Dancer"), contains the same "all OTC drug" coverage as the order in *Thompson*. 96 FTC 1 (1980). The Commission dismissed the Administrative Law Judge's order against a second advertising agency in *Sterling Drug*. 102 FTC at 791.

The scope of product coverage is always an important question in Commission orders that prohibit deceptive advertising. The fact that the Commission chose to impose broader orders on some and more narrow orders on others indicates that the Commission decided it was appropriate to treat the companies differently. Ogilvy has presented nothing to suggest that we should go behind that determination.

The mere fact that several of those orders, like the order against American Home Products and C.T. Clyne, included more limited product coverage than that in the *Ogilvy* and *Thompson* decrees is not a change of law or fact sufficient under Section 5 to require reopening of Ogilvy's consent and conforming it to the more favorable "analgesics" orders. This is particularly true in light of the different product coverage provisions in the "analgesics" cases themselves. As already noted, the product coverage in the order against Dancer in the *Sterling Drug* case is the same as that in *Thompson*, although the orders against Sterling Drug itself, and Ted Bates and Young & Rubicam in *Bristol-Myers*, for example, are not. *See* note 2, *supra*.

Ogilvy also has submitted the affidavit of its Chairman in support of this portion of the company's request for modification. That affidavit states that "[a]s a result of its much broader order, Ogilvy's ability to compete against those agencies has been threatened." Aff. at ¶7. It also states that "[a] number of Ogilvy's clients have expressed concern over the breadth of Ogilvy's order" (*Id.* at ¶8), and that its clients "are concerned that the breadth of Ogilvy's order will chill Ogilvy's creative efforts with respect to all drug products as Ogilvy seeks to avoid even the possibility of a civil penalty." *Id.* at ¶9. These statements are conclusory and self-serving. They do not demonstrate that the current order has imposed on Ogilvy significant harm that could not reasonably have been anticipated at the time the company agreed to its terms, and they offer no information relating to actual, as opposed to speculative, competitive injury. Such information would have had a bearing on the possible public interest in granting the modification.

Under the FTC Act and the Commission's rules, a Commission order need not be altered unless the respondent demonstrates a change of law or fact requiring the modification or the Commission decides that the public interest warrants the changes sought. Ogilvy has failed to carry its burden in this respect, and the Commission, therefore, declines to grant this portion of Ogilvy's request. Similarly, we decline to grant Ogilvy's request that the product scope of Ogilvy's order be modified "at a minimum" to read "OTC drugs" as to Part I and "OTC topical analgesic drugs" as to Part II.

For the reasons above, the Commission has decided that some of the modifications proposed by Ogilvy are appropriate. Accordingly,

It is ordered, That this proceeding be, and it hereby is, reopened and that the order therein against Ogilvy & Mather International, Inc., be modified to read as follows:

ORDER

PART I

It is ordered, That respondent Ogilvy & Mather International, Inc., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, offering for sale, sale or distribution of any over-the-counter "drug", as that term is defined in the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Employing the brand name "Aspercreme" for any such product or otherwise representing, directly or by implication, that an active ingredient of any such product is aspirin, unless such product contains aspirin in therapeutically significant quantities; *provided, however*, that the brand name "Aspercreme" may be used for such product if its advertising and labeling clearly and prominently disclose that the product does not contain aspirin.

(1) In television advertisements, an explicit and simple aspirin disclaimer statement (such as "ASPIRIN FREE") shall be superimposed on the television screen simultaneously with a vocal aspirin disclaimer statement (such as "Aspercreme does not contain aspirin") at the end of each advertisement;

(2) In radio advertisements, an explicit aspirin disclaimer statement (such as "Aspercreme does not contain aspirin") shall be made at the end of each advertisement;

(3) In print advertisements, an explicit aspirin disclaimer statement (such as "ASPERCREME DOES NOT CONTAIN ASPIRIN")

shall be displayed prominently and conspicuously in relation to each such advertisement as a whole;

(4) In labeling, an explicit aspirin disclaimer statement (such as "DOES NOT CONTAIN ASPIRIN") shall be prominently and conspicuously printed in the front package panel (or in the front of the container if no package is used).

B. Representing, directly or by implication, that any such drug involves a new scientific principle, when such drug or one involving such principle has been available for purchase as an over-the-counter drug in the United States for more than one year.

PART II

It is further ordered, That respondent Ogilvy & Mather International Inc., its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any "drug," as that term is defined in the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do cease and desist from:

A. Employing any trade name for any such drug which represents, directly or by implication, that such drug contains an active ingredient which it in fact does not.

B. Representing, directly or by implication, that any such drug has an ingredient when in fact it does not have that ingredient.

C. Misrepresenting the contents, validity, results, conclusions or interpretations of any test or study.

D. Representing, directly or by implication, the mode of action by which any such drug treats, mitigates, or cures any symptom, disease, or condition unless respondent possesses and relies upon a reasonable basis substantiating the representation.

PART III

It is further ordered, That respondent Ogilvy & Mather International, Inc., its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any topically applied drug, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

A. Representing, directly or by implication, that any such topically applied drug is effective for the treatment or relief of the symptoms of any musculoskeletal disorder (such as arthritis, tendonitis, bursitis, or rheumatic disorders), or any other disease or condition;

B. Representing, directly or by implication, that any such topically applied drug is as fast or faster, or is as effective or more effective, than aspirin in the treatment or relief of the symptoms of any musculoskeletal disorder (such as arthritis, tendonitis, bursitis, or rheumatic disorder), or any other disease or condition;

unless at the time of the dissemination of any such representation respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific or medical evidence substantiating that representation. For the purposes of this order, competent and reliable scientific or medical evidence shall include at least two well-controlled, double blinded clinical studies which conform to acceptable designs and protocols and are conducted by different persons, independently of each other. Such persons shall be qualified by training and experience to conduct such studies. *Provided, however,* with respect to any representation covered by this Part, if the Food & Drug Administration promulgates any final standard which establishes conditions under which such product is safe and effective, then in lieu of the above, respondent may possess and rely upon scientific evidence which fully conforms to such final standards as a reasonable basis for said representation. *Provided, further,* however, where the evidence relied upon by respondent was not directly or indirectly conducted or controlled by respondent, it shall be an affirmative defense to an alleged violation of this Part for respondent to prove that it reasonably relied on the expert judgment of its client or of an independent third party in concluding that a reasonable basis exists which meets the requirements of this Part. Such expert judgment shall be in writing signed by a person qualified by education or experience to render the opinion. The written opinion shall describe the contents of the evidence upon which the opinion is based and shall set forth the qualifications of the person to render the opinion.

PART IV

It is further ordered, That respondent Ogilvy & Mather International Inc., its successors and assigns, and its officers, representatives, agents and employees, for a period of three years after respondent last disseminates the advertisements for products covered by this order, shall retain all test results, data, and other documents or information on which it relied for its representations or any documentation which contradicts, qualifies or calls into serious question any claim included in such advertisements which were in its possession during either their creation or dissemination. Such records may be inspected by the staff of the Commission upon reasonable notice.

PART V

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

PART VI

It is further ordered, That respondent shall distribute a copy of this order to each of its operating divisions, and to each of its officers who are engaged in the preparation and placement of advertisements for products covered by this order.

PART VII

It is further ordered, That the provisions of this order shall not apply to Scali, McCabe, Sloves, Inc.; Cole & Weber, Inc.; and Rogers, Weiss/Cole & Weber Advertising, three subsidiary corporations wholly owned by respondent, unless a product otherwise covered by this order is assigned or transferred from respondent to one of those corporations. However, respondent shall distribute a copy of this order to the officers of the aforementioned corporations.

PART VIII

It is further ordered, That the respondent shall, within sixty (60) days after this order becomes final and annually thereafter for three (3) years, file with the Commission a report, in writing, signed by a responsible officer for respondent, setting forth in detail the manner and form in which it has complied with this order.

STATEMENT OF CHAIRMAN DANIEL OLIVER CONCURRING IN PART AND DISSENTING IN PART

I concur in the Commission's decision to modify the Ogilvy order in accordance with paragraph 8 of the consent agreement. I also concur in the decision to delete the portions of the order that were derived from complaint allegations later dismissed in the Thompson proceeding. I would go further, however, and grant some of Ogilvy's other requests.

Before turning to those portions of the Commission's order from which I dissent, I offer a few comments on Ogilvy's request to narrow the product coverage of Part I of the order to "any OTC topically applied analgesic drug." I find this to be a closer question than the other Commissioners find it. Ogilvy contends that its conduct was no worse than that of the ad agencies involved in the *American Home Products* and *Bristol-Myers* cases, and that the product coverage of its order should therefore be no broader than the product coverage of the orders against those agencies (i.e., coverage should be limited to products of the same pharmacological class and mode of application).

I agree, and Ogilvy does not dispute, that a broader order is appropriate if Ogilvy was more culpable than the other ad agencies. I have reviewed the documents upon which the Commission relied in concluding that Thompson Medical Company, Ogilvy's client, intended to make a false "contains aspirin" claim for Aspercreme. *See* 104 FTC at 836. In my view, Ogilvy's contention that there is a less sinister interpretation of the documents has some merit—enough, at least, to raise a question whether Ogilvy really acted more egregiously than its competitors.

Nevertheless, I agree with the decision not to grant Ogilvy's request. Since the issue of Ogilvy's culpability was not litigated, I cannot be certain whether Ogilvy's interpretation of the documents would have been refuted or what other evidence the parties would have presented. In addition, my review of the documents leaves me uneasy about the Commission's ability to make such a difficult factual determination on the basis of the information normally before us in an order modification proceeding.[1] Under the circumstances, I conclude that Ogilvy should not be given the benefit of a litigation victory it chose not to pursue.

I dissent from the Commission's decision not to conform Ogilvy's order to the Thompson decree except to the extent expressly required by paragraph 8 of the consent agreement. I would allow the other changes requested by Ogilvy to conform its order to Thompson's. Ogilvy argues that denying its request for other modifications will discourage settlements since ad agencies will perceive that they can obtain a less restrictive order by litigating. I am not persuaded by this argument.[2] I am persuaded, however, that there is no basis in the record for treating Ogilvy more harshly than Thompson. The two respondents were named in a single complaint on the basis of a single set of facts. I fail to see how the public interest is served by maintaining tighter restrictions on one respondent than the other absent some factual distinction justifying disparate treatment.

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[1] The best course of action in this case might have been to reopen the proceeding for an evidentiary hearing to compare the conduct of Ogilvy with that of its competitors.

[2] Although in this instance the litigated order turned out to be less restrictive than the consent order, that fact became apparent only in hindsight. At the point Ogilvy was considering whether to sign the consent order, Ogilvy did not know whether the litigated order would be more restrictive or less restrictive than the consent order. Future respondents will be faced with the same uncertainty, and thus will have just as much incentive as ever to settle the Commission's charges.

I also dissent from the decision not to exempt the two additional advertising subsidiaries from the Ogilvy order. Ogilvy argues, I believe correctly, that it was understood that subsidiaries would be exempted if it were shown on a case-by-case basis that the subsidiary, by virtue of its management agreement with Ogilvy, would operate independently of Ogilvy. Given this understanding, it is unreasonable to expect Ogilvy to have felt the need to seek more explicit language in the order.[3] Clearly, memorializing the understanding would have been the better course, and I would expect such understandings to be committed to writing in future orders. But in this instance, I do not think it is appropriate for the Commission to ignore the intent that guided the negotiation of the order.

The factual determination of whether the new subsidiaries qualify for exemption is a simple one. In my view, Ogilvy has presented sufficient evidence to establish that Rolf Werner Rosenthal and Euramerica, Inc. operate independently of Ogilvy. If these corporations had been advertising subsidiaries of Ogilvy at the time the order was signed, Ogilvy likely would have sought, and the Commission likely would have agreed, to treat them the same as the three subsidiaries specifically exempted in Part VI of the order. The acquisition of RWR and the conversion of Euramerica to advertising after the order was signed are changes of fact that, in my view, justify modification of the order.[4] Although the emergence of additional subsidiaries was foreseeable at the time the order was signed, Ogilvy, as noted above, had reason to believe that future subsidiaries would be considered for exemption.

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[3] Moreover, here there was a conscious decision *not* to include a generalised exemption in order to avoid creating a loophole by which Ogilvy could circumvent the order.

[4] Granting this modification would not enable Ogilvy to circumvent the order by steering clients to RWR and Euramerica. Part VI of the order provides that the exemption does not apply if a product otherwise covered by the order is (1) transferred by Ogilvy to an exempted subsidiary, or (2) assigned by Ogilvy to an exempted subsidiary.

IN THE MATTER OF

MEDICAL STAFF OF MEMORIAL MEDICAL CENTER

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3231. Complaint, June 1, 1988—Decision, June 1, 1988

This consent order prohibits, among other things, the medical staff of a Savannah, Ga. medical center from denying, restricting, or recommending denial or restriction of hospital privileges for any nurse-midwife, unless the staff has a reasonable basis for believing that such restriction serves the interest of the hospital in providing health care services. Respondent will also be prohibited from refusing to deal with or coercing the hospital or any person, organization, or institution, if the purpose or effect is to restrict the practice of nurse-midwifery.

Appearances

For the Commission: *Harold Kirtz.*

For the respondent: *John Horty* and *Linda Haddad, Horty, Springer & Mattern*, Pittsburgh, PA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Medical Staff of Memorial Medical Center ("the Medical Staff") is an unincorporated association, organized and existing under the laws of the State of Georgia, with its mailing address at 4700 Waters Avenue, Savannah, Georgia.

It is composed of all physicians, dentists and podiatrists who have been granted privileges to attend patients at Memorial Medical Center.

PAR. 2. Memorial Medical Center is a 465-bed general, acute-care hospital and is the largest hospital in the Savannah metropolitan area. It is one of three hospitals in the Savannah metropolitan area that provide obstetrical services, and it accounts for nearly half of the births in that area.

PAR. 3. Most, if not all, members of the Medical Staff are engaged in the business of providing health care services for a fee. Except to the extent that competition has been restrained as herein alleged, most, if not all, members of the Medical Staff have been and are now in competition among themselves and with other health care practitioners in the Savannah metropolitan area. The Medical Staff's physician members constitute the majority of the practicing physicians in the Savannah metropolitan area.

PAR. 4. The Medical Staff engages in substantial activities for the economic benefit of its members. It is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act.

PAR. 5. Members of the Medical Staff charge fees and collect payments for their services that, in substantial part, are paid directly or indirectly with federal funds or funds received interstate from insurance companies and from other payers. The flow of such funds is affected by competition among health care practitioners in the Savannah metropolitan area, and by the acts and practices of the Medical Staff and its members as herein alleged. Health care practitioners in the Savannah metropolitan area treat out-of-state patients, and purchase goods and supplies from out-of-state vendors, and the ability of a practitioner, including a nurse-midwife, to obtain hospital privileges may influence his or her decision to move to and practice in the Savannah metropolitan area. The acts and practices described herein are in commerce or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act.

PAR. 6. Pursuant to its bylaws, the Medical Staff has organized itself into various departments and committees, including a Credentials Committee. The Credentials Committee reviews the credentials of all applicants for privileges at Memorial Medical Center and receives recommendations from the clinical department in which an applicant requests privileges. The Credentials Committee is the final decisionmaker when it denies or limits privileges to "medical assistants," who are defined under the Medical Staff bylaws as "individuals who are licensed or certified and who provide services within the scope of their license and certification as employees of physicians or dentists who are presently appointed to the medical staff." Under the bylaws of the Medical Staff, nurse-midwives would be considered as a category of "medical assistants." Accordingly, a nurse-midwife seeking to practice at Memorial Medical Center as an employee of a member of the Medical Staff must have such privileges approved by the Medical Staff's Credentials Committee.

PAR. 7. A nurse-midwife is a registered nurse who has received additional training in the care and management of normal pregnancies and deliveries. Under the laws of the State of Georgia, a nurse-midwife who satisfies the State's educational and credentials requirements is authorized to practice in accordance with the standards defined by the American College of Nurse-Midwives. Georgia law requires that a nurse-midwife must practice in collaboration with a physician, but does not require that a physician be physically present while a nurse-midwife provides services, including services in connection with delivery.

PAR. 8. Because nurse-midwifery services can substitute for certain kinds of obstetrical services provided by physicians, the availability of nurse-midwifery services, whether provided by self-employed nurse-midwives or by those working as employees of physicians or others, can offer a greater range of choices for consumers and increase competition in the provision of obstetrical care. For example, a nurse-midwife working as an employee of a physician may allow the physician to concentrate on patients whose conditions require the care of a physician, and thereby increase the efficiency with which obstetrical services are provided and increase the availability of such services.

PAR. 9. Some members of the Medical Staff provide obstetrical services, and are actual or potential competitors of nurse-midwives and of physicians who affiliate with nurse-midwives.

PAR. 10. Nurse-midwives and physicians who provide obstetrical services usually consider it necessary to have privileges at a hospital convenient to their patients. A practitioner who does not have such privileges may be at a significant competitive disadvantage vis-a-vis those who do.

PAR. 11. Rebecca Almand is a registered nurse who is authorized under Georgia state law to practice as a nurse-midwife, and was employed by obstetricians who are members of the Medical Staff. In January 1983, Almand requested privileges at Memorial Medical Center, among other things, to perform spontaneous vaginal deliveries with a physician in attendance. Almand was the first nurse-midwife ever to apply for privileges at Memorial Medical Center. The Medical Staff's Department of Obstetrics and Gynecology recommended against Almand's request on the grounds that no nurse-midwife should be permitted to deliver babies at Memorial Medical Center and that there was "no shortage of obstetricians in the Savannah area." The Department of Obstetrics and Gynecology did not, however, offer any evidence that Almand was not qualified to provide the services for which she sought privileges. The Credentials Committee found that Almand had acceptable credentials and met all applicable criteria set forth in the Medical Staff's bylaws, and that there was no basis for denying Almand's request for privileges. Accordingly, in August 1983, the Credentials Committee voted unanimously to approve Almand's request for privileges.

PAR. 12. Within weeks after the Credentials Committee's decision to approve Almand's request for privileges, eleven of the nineteen physicians with active privileges in the Medical Staff's Department of Obstetrics and Gynecology petitioned the Credentials Committee, "protesting and opposing" the Committee's decision to approve privileges despite the fact that the Department of Obstetrics and Gynecology had "turned down" Almand's application, and objecting that not all Committee members had been present when the Committee decided to approve Almand's request for privileges. Members of the Credentials Committee also were told that some obstetricians had threatened to shift patient admissions from Memorial Medical Center to another hospital because of the Committee's decision to approve Almand's request for privileges. The Committee members decided to reconsider their approval of privileges for Almand.

PAR. 13. In September 1983 the Credentials Committee met to reconsider their approval of Almand's request for privileges. Two representatives of the Department of Obstetrics and Gynecology attended the meeting and presented the Department's objection to the granting of any delivery privileges to a nurse-midwife. The Department's representatives said, among other things, that granting nurse-midwives delivery privileges would create an "economic problem" for obstetricians and that there was "no need in the community" for such nurse-midwifery services. The Department's representatives offered no evidence that Almand was not competent to provide the delivery services for which she had been approved. During this meeting, one of the physicians representing the Department of Obstetrics and Gynecology threatened to shift his patient admissions from Memorial Medical Center to another hospital if Almand were granted delivery privileges. At the conclusion of the meeting, the Credentials Committee voted to reverse its earlier decision and to deny Almand's request for delivery privileges, manifesting a policy against granting delivery privileges under any terms to any nurse-midwife. Under the Medical Staff's bylaws, Almand had no right to appeal the Credentials Committee's adverse decision.

PAR. 14. In January 1984 Almand reapplied for delivery privileges with a physician in attendance. In May 1984, after receiving a recommendation from the Department of Obstetrics and Gynecology opposing such privileges, the Credentials Committee denied Almand's application.

PAR. 15. There was no reasonable justification for the actions of the Credentials Committee described in paragraphs thirteen and fourteen.

PAR. 16. In engaging in the acts and practices described above, respondent Medical Staff, acting through its Credentials Committee, has acted as a combination of its physician members or in conspiracy with some of them.

PAR. 17. The purpose, effects, tendency or capacity of the acts and practices described in paragraphs eleven through sixteen is and has been to restrain trade unreasonably and hinder competition in the provision of health care services in the Savannah metropolitan area, and to deprive consumers of the benefits of competition in the following ways, among others:

A. Consumers have been limited in their ability to choose among alternative types of health care providers competing on the basis of price and service;

B. Physicians have been restricted from offering the services of nurse-midwives to their patients; and

C. Nurse-midwives have been restrained from offering their services to patients and may be deterred from entering into practice in the Savannah metropolitan area.

PAR. 18. The combination, conspiracy, acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Such combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Medical Staff of Memorial Medical Center is an unincorporated association, organized and existing under and by virtue of the laws of the State of Georgia, with its mailing address at 4700 Waters Avenue, in the City of Savannah, State of Georgia.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for purposes of this order, the following definitions shall apply:

A. "*The hospital*" means Memorial Medical Center, Inc., its trustees, officers, representatives, agents, employees, successors and assigns.

B. "*Respondent*" means the respondent Medical Staff of Memorial Medical Center, its officers, committees, representatives, agents, employees, successors and assigns.

C. A "*nurse-midwife*" means a registered nurse who is authorized under Georgia state law to practice nurse-midwifery.

II.

It is further ordered, That respondent, directly or indirectly or through any device, in connection with its activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Deciding or recommending to deny, limit or otherwise restrict hospital privileges for any nurse-midwife, without a reasonable basis for believing that the denial, limitation or restriction serves the interest of the hospital in providing for the efficient and competent delivery of health care services.

B. Refusing or threatening to refuse to deal with, or otherwise coercing or attempting to coerce, the hospital or any other person or entity for the purpose or with the effect or likely effect of restricting the practice of nurse-midwifery or of any nurse-midwife.

III.

It is further ordered, That, for a period of five years from the date of service of this order, whenever a nurse-midwife applies for privileges at the hospital, within thirty (30) days after respondent takes any action with respect to such application, respondent shall provide the hospital's governing body with a written statement of respondent's action and its reasons therefor.

IV.

It is further ordered, That respondent shall act upon any reapplication for privileges within four months after receiving a complete application from any nurse-midwife who, since January 1, 1982, has formally or informally sought privileges at the hospital.

V.

It is further ordered, That:

A. Within thirty (30) days after the date of service of this order, respondent shall provide a copy of this order and of the complaint in this proceeding to each officer of respondent and to each member of respondent who was an officer or a member on the date of service of this order and, for a period of five (5) years after that date, provide a copy of such order and complaint to each person who applies or requests an application to become a member of respondent, at the time that each such person applies or requests an application;

B. Within ninety (90) days after the date of service of this order, respondent shall file with the Commission a verified written report setting forth in detail the manner and form in which it has complied and is complying with this order; and

C. In addition to the report required by Section V(B), respondent shall file, one (1) year after the date of service of this order and at such other times as the Commission may by written notice require, a written report setting forth in detail the manner and form in which respondent has complied and is complying with this order.

VI.

It is further ordered, That respondent shall notify the Commission of any proposed change in its organization that may affect compliance obligations arising out of this order at least thirty (30) days prior to the effective date of any such proposed change.

Commissioner Bailey not participating.

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

I have voted for final acceptance of the consent order in this matter. However, I would have preferred an order that included a provision for automatic termination after ten years. In my view, an antitrust conduct order should be preserved only so long as its benefits outweigh its costs. Maintaining an order such as this in perpetuity is not ordinarily appropriate. Its procompetitive remedial benefits can be expected to decline over time, and it may also begin to have adverse effects on certain procompetitive practices.

With respect to orders in merger cases, the Commission has already concluded that "order provisions requiring prior Commission approval of future acquisitions generally should not have terms exceeding ten years."[1] The Commission determined that such provisions will in most cases have served their remedial purposes after ten years, and "the findings upon which such provisions are based should not be presumed to continue to exist for a longer period of time."[2] For similar reasons, I believe that the consent order at issue here should automatically terminate after ten years.

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[1] *Hercules, Inc.*, 100 FTC 531 (1982) (modifying order); *see also, e.g., MidCon Corp.*, 107 FTC 48, 58 (1986) (consent order) (ten years); *Hospital Corp. of America*, 106 FTC 361, 524 (1985) (ten years), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1975 (1987); *Columbian Enterprises, Inc.*, 106 FTC 551, 554 (1985) (consent order) (five years).

[2] *Hercules, Inc.*, 100 FTC at 531.

IN THE MATTER OF

MASSACHUSETTS BOARD OF REGISTRATION IN OPTOMETRY

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9195. Complaint, July 8, 1985—Final Order, June 13, 1988

This Final Order requires the Massachusetts board to allow truthful advertising by optometrists in the state, requires the optometry board to repeal its current regulation banning advertising of affiliations between optometrists and optical retailers, and also requires respondent to send a copy of the order to all optometrists currently licensed in Massachusetts and to all new applicants for five years.

Appearances

For the Commission: *Elizabeth Hilder.*

For the respondent: *Thomas A. Barnico* and *Steven H. Goldberg, Assistant Attorneys General,* Boston, MA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated Section 5 of the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

Respondent

1. Respondent Massachusetts Board of Registration in Optometry (hereinafter "the Board") is organized, exists, and transacts business under the laws of the Commonwealth of Massachusetts (Mass. Gen. Laws Ann. ch. 13 §§16 *et seq.* and ch. 112 §§66 *et seq.*), with its principal office at 100 Cambridge Street, Boston, MA. The Board is subject to the Commission's jurisdiction under the Federal Trade Commission Act.

2. The Board is composed of four optometrists and one public member, as provided in Mass. Gen. Laws Ann. ch. 13 §16.

3. While serving their membership terms, optometrist members of the Board may, and do, continue to engage in the business of providing

optometric services for a fee. Compensation for serving on the Board is limited to five hundred seventy-five dollars per year plus necessary traveling expenses for carrying out the business of the Board, and is paid out of fees collected by the Board. [2]

4. The Governor of the Commonwealth of Massachusetts appoints the four optometrist members and the public member of the Board.

5. The Board is the sole licensing authority for optometrists in Massachusetts. It is unlawful for an individual to practice or to offer to practice optometry in Massachusetts unless he or she holds a current license to practice issued by the Board.

6. The Board is authorized by Massachusetts law, Mass. Gen. Laws Ann. ch. 112 §71, to take disciplinary action against any licensee who engages in unprofessional conduct, fraud, deceit or misrepresentation in practice or in advertising, or who violates any rule or regulation promulgated by the Board pursuant to Mass. Gen. Laws Ann. ch. 112 §67. Disciplinary action by the Board may include the suspension or revocation of a license, or other limitations or restrictions on a licensee.

7. Board actions pertaining to optometrists in the Commonwealth of Massachusetts are decided by the four optometrist Board members, each of whose principal occupation is the private practice of optometry, and the public member.

Trade and Commerce

8. Except to the extent that competition has been restrained as alleged below, and depending on their geographic location, optometrists in Massachusetts compete with each other and with optometrists serving on the Board.

9. There are more than 1300 optometrists practicing in Massachusetts. More than $100 million are spent on eye care annually in Massachusetts by Massachusetts residents, governmental entities, and private third-party payers.

10. In the conduct of their businesses, optometrists in Massachusetts receive and treat patients from other states, receive substantial sums of money that flow across state lines from the federal government and from private insurers for rendering eye care services, purchase and use supplies and equipment that are shipped across state lines, and engage in business with optical establishments that conduct business throughout the United States. The acts and practices described below are in interstate commerce, or affect the interstate activities of optometrists in Massachusetts and third parties who pay for eye services, and are in or affect commerce within the meaning of Sections 4 and 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 44 and 45(a)(1). [3]

State Regulation of Optometry

11. With the exception of a statute barring claims that eyes are examined for free, the Commonwealth of Massachusetts does not, by statute or otherwise, ban or have any policy of banning truthful discount advertising by optometrists, truthful advertising about the goods and services that optometrists offer, or any other truthful advertising by optometrists.

Board Conduct

12. The Board has restrained competition among optometrists in Massachusetts by combining or conspiring with its members or others, or by acting as a combination of its members or others, to unreasonably restrict truthful advertising by optometrists. In particular:

a. Since at least January 1981, the Board has combined or conspired to prohibit optometrists from truthfully advertising discounts from their usual prices and fees;

b. Since at least January 1981, the Board has combined or conspired to prohibit optometrists from permitting optical establishments or other commercial practices to truthfully advertise the optometrists' names or the availability of their services; and

c. Since at least October 1984, the Board has combined or conspired to prohibit optometrists from making use of truthful advertising that contains testimonials or that is "sensational" or "flamboyant."

13. The Board has engaged in various acts or practices in furtherance of this combination or conspiracy, including, among other things, the following:

a. Since at least January 1981, the Board has prohibited advertising by optometrists of discounts from their usual prices and fees, without regard to the truth or falsity of such advertising, on the purported ground that such advertising violates Board regulations and a Massachusetts statute that bars the use of words or phrases that convey the impression that eyes are examined for free (Mass. Gen. Laws Ann. ch. 112 §73A); [4]

b. Since at least January 1981, the Board has prohibited optometrists from permitting optical establishments and other commercial practices to advertise the optometrists' names or professional abilities, without regard to the truth or falsity of such advertising;

c. Since at least January 1981, the Board has coerced and intimidated optometrists into not advertising discounts from their usual prices and fees and into not permitting optical establishments or other commercial practices to advertise their names or the availability of their services, by using one or more of the following practices: (i) sending investigators to interrogate them and inform them that such practices were improper; (ii) demanding their attendance at informal meetings at which the Board instructed them to cease such conduct because it violated Board regulations and state law; (iii) threatening to bring disciplinary action against them unless they ceased such conduct; and (iv) bringing disciplinary action against them for engaging in such conduct;

d. In October 1984, the Board promulgated and implemented regulations that prohibit advertising by optometrists that offers gratuitous services, rebates, discounts, refunds, or otherwise for the purpose of increasing the number of private patients, without regard to the truth or falsity of the advertising;

e. In October 1984, the Board promulgated and implemented regulations that prohibit advertising that contains testimonials or that is "sensational" or "flamboyant"; and

f. In October 1984, the Board promulgated and implemented regulations that prohibit optometrists from permitting or authorizing optical establishments or businesses to advertise or publicize the optometrists' names or the availability of their services. [5]

Effects

14. The effects of the combination or conspiracy and the acts or practices described above are and have been to restrain competition unreasonably and injure consumers in the following ways, among others:

a. Consumers are being deprived of truthful information about optometrists' services, prices, and fees, such as information about optometrists' offering of discounts to the elderly or others;

b. Consumers are being deprived of the benefits of vigorous price and service competition among optometrists;

c. Consumers are being deprived of truthful information about the availability and convenient location of optometrists' services, such as information that optometrists are located adjacent to optical establishments;

d. Optometrists are being prevented from disseminating truthful information about their prices and fees, and are being prevented from permitting optical establishments and other commercial practices to truthfully advertise or publicize their names or the availability of their services; and

e. Some consumers have paid higher prices for optometric services, some consumers have delayed or forgone needed optometric services, and some consumers have bought optometric services that are less desirable to them than the services they would have purchased in the absence of the combination, conspiracy, acts, and practices.

Violation

15. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition or unfair or deceptive acts or practices that violate Section 5 of the Federal Trade Commission Act. This combination or conspiracy and these acts or practices are continuing and will continue unless the Commission enters appropriate relief against the Board.

INITIAL DECISION BY

JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE

JUNE 20, 1986

PRELIMINARY STATEMENT

The complaint in this case was issued on July 8, 1985. It charges that the respondent Massachusetts Board of Registration in Optometry ("the Board") has engaged in unfair methods of competition and unfair acts and practices in violation of Section 5 of the FTC Act (15 U.S.C. 45) and that these acts and practices are in or affect commerce.

The complaint alleges that respondent has restrained competition among optometrists in the Commonwealth of Massachusetts by combining or conspiring with some of its members to unreasonably restrict truthful advertising by optometrists by: prohibiting optometrists from truthfully advertising discounts from their usual prices and fees; prohibiting optometrists from permitting optical establishments or other commercial practices to truthfully advertise the optometrists' names or the availability of their services; and prohibiting optometrists from making use of truthful advertising that contains testimonials or that is "sensational" or "flamboyant."

The complaint further alleges that the effect or tendency of the combination or conspiracy has been to restrain competition unreasonably and to injure consumers by:

(1) depriving consumers of truthful information about optometrists' service, prices, and fees;

(2) depriving consumers of the benefits of vigorous price and service competition among optometrists;

(3) preventing optometrists from disseminating truthful information about prices and fees; and

(4) preventing optometrists from permitting commercial establishments to truthfully advertise or publicize their names or the availability of their services. [2]

On August 27, 1985, the Board filed an answer denying the allegations and asserting as affirmative defenses that it is not a "person, partnership or corporation" under Section 5 and that the state action doctrine immunized its conduct.

The Board moved for summary dismissal or summary disposition of the complaint on October 31, 1985, arguing that the Federal Trade Commission lacks jurisdiction in this proceeding because (1) the Board is exempt from antitrust action under the state action doctrine; and (2) the Board is not a "person, partnership or corporation" subject to the Federal Trade Commission Act. The motion was denied on November 19, 1985.

On January 10, 1986, the Board moved for dismissal or summary disposition claiming that the Board has not acted as a combination or conspiracy and for partial summary disposition claiming that adoption of regulations in November, 1985, moots this proceeding concerning those regulations that respondent had changed. After oral argument the motion was denied on February 10, 1986.

Adjudicative hearings commenced in Boston, Massachusetts on February 10, 1986. On February 27, 1986 the Board moved to dismiss based on *Fisher v. City of Berkeley*, 106 S.Ct. 1045 (decided February 26, 1986). Counsel for the parties filed briefs and oral argument was heard, and the motion was denied on March 27, 1986.

On March 27, 1986, the record was closed. [3]

I. FINDINGS OF FACT

A. The Respondent

1. Massachusetts Board of Registration in Optometry

1. The respondent Board is a state agency that regulates the practice of optometry in Massachusetts. (F 2–13; Stip.).[1]

2. The Board is organized, exists, and transacts business under the laws of the Commonwealth of Massachusetts. Mass. Gen. Laws Ann. ch. 13, §§ 16–18, ch. 112, § 61 and ch. 112, §§ 66–73B (Complaint ¶1; Answer ¶1; CX 16A to C; CX 17; and CX 18A to S).

3. The Board consists of five members, four of whom are optometrists and the fifth is a public member. (Complaint ¶2; Answer ¶2; CX–16–A). The public member of the Board has not participated in

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[1] "F" means finding; "Stip." means stipulated (see addendum to respondent's proposed findings); "CX" means Commission exhibit; "RX" means respondent's exhibit; "TR" means transcript. References to the transcript are usually by the name of the witness followed by the page number.

any Board activities since December, 1982. (CX 81A; CX 90B; CX 242 at 18–19).

4. While on the Board, optometrist members continue to provide optometric services for a fee. (Complaint ¶2; Answer ¶2). The compensation for serving on the Board is five hundred seventy-five dollars per year, plus necessary travel expenses for carrying out the business of the Board. (CX 16C; Stip.).

5. All Board decisions are by a majority vote of its members. (CX 242 at 20). The Board members choose a chairman and secretary by majority vote. (*Id.*). The chairman and secretary serve for one year terms. (CX 16C). The responsibilities of the chairman include interpretation of Massachusetts statutes and Board regulations governing the practice of optometry. (DiGregorio 630–631).

6. Dr. DiGregorio was chairman from 1977 to 1981 (DiGregorio 630); Dr. Wagner chaired the Board from 1981 to 1982 (CX 69A); Dr. Exford chaired the Board from 1982 to 1983 (Exford 449); and Dr. Rapoport succeeded Dr. Exford and is the current chairman (CX 89A; CX 94A; Rapoport 515). At all times relevant to the complaint, the secretary has been an optometrist: Dr. Exford was secretary from 1977 to 1982 (Exford 449); Dr. Rapoport was secretary from 1982 to 1983 (CX 79A); Dr. Lamont was secretary from September, 1983, to September, 1985 (CX–242 at 16); and Dr. Oliver is the current secretary. (RX 27A) (Stip.). [4]

7. The practice of optometry in Massachusetts is governed by statutes enacted by the legislature and by regulations promulgated by the Board. (Stip.).

8. Massachusetts statutes define the practice of optometry. Mass. Gen. Laws Ann. ch. 112, § 66. (CX 18A). Massachusetts statutes require that anyone who practices optometry be licensed by the Board. Mass. Gen. Laws Ann. ch. 112, § 68. (CX 18E, 18F; CX 2B).

9. The Board is authorized by Mass. Gen. Laws Ann. ch. 112, § 67, to promulgate rules and regulations governing the practice of optometry. (CX 18C). Optometrists who engage in the practice of optometry in Massachusetts are required to comply with regulations promulgated by the Board. (CX 2B).

10. The Board is authorized by Mass. Gen. Laws Ann. ch. 112, § 61 and § 71 to revoke or suspend the license of any optometrist for professional actions that constitute unprofessional conduct, gross misconduct or incompetence, and malpractice. (CX 17; CX 18K). The Board is authorized to take the same actions for violations of any rule or regulation promulgated by the Board (CX 17; CX 18K). Under Mass. Gen. Laws Ann. ch. 112, § 72A, the Board may seek criminal sanctions including fines and imprisonment for violations of its rules and regulations. (CX 17; CX 18M; Stip.). The Board holds hearings to

determine the technical competence of optometrists who may be seeing too many patients. (CX 61–62).

11. Massachusetts law limits the authority of the Board to restrict truthful advertising. (CX 17). Section 61 of Mass. Gen. Laws Ann., ch. 112, provides that:

> [e]xcept as otherwise provided in this chapter, no such board [of registration] shall make any rule or regulation prohibiting the advertising or dissemination of truthful information concerning the price, nature and availability of goods and services to consumers the effect of which would restrain or lessen competition.

In promulgating Section 61, the Massachusetts Legislature declared that:

> any ordinance, rule or regulation promulgated by an agency of the commonwealth or political subdivision thereof which prohibits or limits competitive advertising relating to the price of consumer goods or services shall be void as against public policy. [5]

12. The only restriction on truthful advertising by optometrists is Mass. Gen. Laws Ann. ch. 112, § 73A (CX 18P):

> Persons may advertise the sale price of eyeglasses, contact lenses or eyeglass frames provided they shall not include in any newspaper, radio, display sign or other advertisements any statement of a character tending to deceive or mislead the public, or any statement which in any way misrepresents any material or service or credit terms, or, any statement containing the words "free examination of eyes," "free advice," "free consultation," "consultation without obligation," or any other words or phrases of similar import which convey the impression that eyes are examined free. Any advertisement offering contact lenses, eyeglasses, or eyeglass frames at a fixed price shall include a statement which indicates that said price does not include eye examination and professional services. Such statement shall indicate whether said price includes lens and, if so, the type of lens, single vision, bi-focal or tri-focal and the strength thereof, low, medium or high.

13. The Board is not supervised by any other branch of Massachusetts state government. (CX 5U). While the Board falls within the Division of Registration and the Executive Office of Consumer Affairs, these offices have only advisory power. (*Id.*) (Stip.).

2. Board Procedures

a. Enforcement of Regulations

14. After receipt of a complaint, the Board writes a letter or places a telephone call to the subject of the complaint. (CX 242 at 66; F 118, 127–29).

15. If the complaint is not resolved, the optometrist is invited to attend an informal conference. (CX 242 at 66–67) (Stip.).

16. Complaints that are not resolved informally are resolved at a

formal hearing at which witnesses are sworn and testimony is transcribed. (*Id.* at 67) (Stip.). **[6]**

17. Most complaints are resolved informally. (CX 241 at 57; Exford 467–68) (Stip.).

18. None of the enforcement actions involving discount or affiliation advertising on this record has involved a formal hearing. (F 116–32, Stip.).

b. Interpretation of Regulations

19. The Board has interpreted Massachusetts statutes and regulations. (DiGregorio 631–37, 651–52; CX 67B). The Board does not distribute interpretations of its regulations to optometrists in Massachusetts. (Rapoport 529–30).

20. The Board has issued no interpretations regarding its current regulations. (Rapoport 538; CX 246 at 30–33) (Stip.).

3. The Optometrist Members of the Board

21. The optometrist members of the Board do not advertise, participate in referral relationships with opticians or optical establishments, or offer discounts. (F 22–33).

22. Haskell I. Rapoport, O.D., has been a member of the Board from about October 1980 to the present. (CX 5A); Rapoport 514–15). While on the Board, Dr. Rapoport's primary source of income has been the private practice of optometry as a solo practitioner. (Rapoport 515–16) (Stip.).

23. Dr. Rapoport has not advertised except by permitting his name to be used in professional listings in high school programs and through office signs and listings in the Yellow Pages in which he has listed only his name, address and telephone number. (CX 5E). He acquires patients by word-of-mouth referrals. (Rapoport 517). He does not offer discounts to obtain patients. (*Id.* at 518) (Stip.).

24. Alton W. Lamont, O.D., has been a member of the Board from about November, 1981, to the present. (CX 5A–B). While on the Board, Dr. Lamont's primary source of income has been his practice of optometry as a solo practitioner. (CX 242 at 6–8) (Stip.).

25. Dr. Lamont has not advertised other than through office signs and listings in the Yellow Pages in which he has listed only his name, address and telephone number. (CX 5E). He relies on word-of-mouth referrals to attract patients. (CX 242 at 9–10). Dr. Lamont does not offer discounts. (*Id.* at 10–11) (Stip.). He competes with chain optical establishments as well as other optometrists. (CX 242 at 13–14; Feldman 375).

26. Jon Volovick, O.D., has been a member of the Board from about November, 1983, to the present. (CX 5B). While on the Board, Dr.

Volovick's primary source of income has been his [7] practice of optometry as a solo practitioner. (CX 241 at 7–10) (Stip.).

27. Dr. Volovick has not advertised other than through office signs and listings in the Yellow Pages in which he has listed only his name, address and telephone number. (CX 5E). Dr. Volovick does not offer discounts. (CX 241 at 16–17) (Stip.).

28. Frederick J. Wagner, O.D., was a member of the Board from 1959 to July, 1985. (CX 240 at 4–5; CX 5B) (Stip.).

29. Dr. Wagner has never advertised except to list his name in the Yellow Pages. (CX 240 at 40–41). Dr. Wagner relies on word-of-mouth referrals to attract patients. (CX 240 at 41–42). He has never offered discounts to customers. (CX 240 at 41) (Stip.).

30. Dr. Joan Exford, O.D., who is also sometimes referred by her married name, Dr. Korb (Exford 448–49), was a member of the Board from about May, 1976, through December, 1983. (CX 5B). Dr. Exford does not advertise to obtain new patients. (Exford 470) (Stip.).

31. Dr. Leonard DiGregorio, O.D., was a member of the Board from 1966 to 1981. (DiGregorio 629–30). During Dr. DiGregorio's term on the Board, the practice of optometry was his primary source of income. (*Id.*).

32. Dr. DiGregorio has never engaged in paid advertising (*id.* at 643–44), nor has he ever offered discounts to attract patients. (*Id.* at 643). However, Dr. DiGregorio has participated in various community activities to "let people know what you do." (*Id.* at 644). Dr. DiGregorio also relies on word-of-mouth referrals to attract patients. (*Id.* at 643).

33. Paul Oliver, O.D., has been a member of the Board from July, 1985, to the present. (CX 101A). Dr. Oliver is in a solo practice. Dr. Oliver does not advertise. (CX 5B) (Stip.).

34. Board members believe that advertising, offering discounts, or affiliating in referral arrangements with optical establishments is inconsistent with optometry's status as a learned profession. (F 35–40, 83).

35. The Board considers the practice of optometry to be a learned profession. (CX 261 at 34; Volovick 662, 670).

36. The Board has distinguished the practice of optometry from the practice of opticianry on the ground that "[o]pticianry is a trade and not a profession." (CX 261 at 35) (Stip.).

37. The optometrists on the Board do not advertise. (F 23, 25, 27, 29–30, 32–33) (Stip.). [8]

38. The Board considers discount advertising between optometrists and non-optometrists to be inherently deceptive. (CX 7B).

39. The Board considers advertising affiliations between optome-

trists and non-optometrists ("affiliation advertising") to be inherently deceptive. (CX 7D).

40. The optometrists on the Board do not offer discounts to attract patients. (F 23, 25, 27, 29, 30, 32) (Stip.).

B. The Market

1. Types of Practice

41. Three professional groups provide eyecare: ophthalmologists, optometrists, and opticians. (F 42–54) (Stip.).

42. An ophthalmologist is a physician who has served a residency in ophthalmology. (Exford 508). An ophthalmologist examines eyes and prescribes eyeglasses and contact lenses, but primarily treats the eye for diseases and performs surgery. (*Id.* at 508; Collinson 362). Ophthalmologists are regulated by the Massachusetts Board of Registration in Medicine. (Exford 499–500). Ophthalmologists are permitted to advertise discounts and affiliations with non-ophthalmologists. (CX 327Z at 24) (Stip.).

43. Optometrists are authorized to diagnose, by any means except drugs, deficiencies in the human eye and prescribe corrective lenses. They may not diagnose or treat eye diseases. Mass. Gen. Laws Ann. ch. 112, § 66. (CX 18A). In addition to prescribing lenses, optometrists sell and fit glasses and contact lenses. (CX 261 at 36; *See e.g.*, DiGregorio 628–29). Optometrists attend a college of optometry and must pass an examination administered by the Board. (Exford 508; CX 18E).

44. Opticians are authorized to prepare and sell eyeglasses and contact lenses based upon prescriptions from an optometrist or ophthalmologist. Mass. Gen. Laws Ann. ch. 112, § 73C. (CX 18S, 18T). In this respect, opticians are analogous to a pharmacist who fills drug prescriptions. (Convissar 207). They may not prescribe lenses or diagnose or treat eye diseases or deficiencies. (CX 18S; 18T).

45. Opticians are regulated by the Massachusetts Board of Registration for Dispensing Opticians. Mass. Gen. Laws Ann. ch. 112, § 73D. (CX 18U; Collinson 362–63). No person can engage in the practice of opticianry unless the person has a license granted by the Board of Registration for Dispensing Opticians. Mass. Gen. Laws Ann. ch. 112, § 73D. (CX 18U) (Stip.). [9]

46. Opticians receive their training either by participating in a three year apprenticeship or by attending opticianry school. (Collinson 363; Kahn 549) (Stip.).

47. The Board of Registration of Dispensing Opticians has never received a deceptive advertising complaint against a chain. (Collinson at 365) (Stip.).

48. Opticians and optometrists may work together or in affiliation, but the optometrist must practice in a "separate premises" from the optician. Mass. Gen. Laws Ann. ch. 112, § 73B. (CX 18R).

49. A "separate premises" for this purpose is defined by Massachusetts law as "any room, suite of rooms or an area which optometry is practiced shall be considered separate premises if it has a separate and direct entrance from the street, public corridor or area available to the public, whether or not it has an entrance from any other room or area in the same building." Mass. Gen. Laws Ann. ch. 112, § 73B. (CX 18R).

50. The optometrist may not share, directly or indirectly, with an optician "any fees received in connection with said practice of optometry." Mass. Gen. Laws Ann. ch. 112, § 73B. (CX 18R).

51. A Pearle Vision Center is a chain of retail stores each with an optical dispensary selling optical goods and with an adjacent optometrist's office. (Kahn 553, 554). There is a separate entrance into the optometrist's office from the outside, as well as a sliding glass door between the optometrist's office and the Pearle Vision Center. (*Id.* at 555). The office space is subleased by Pearle to an optometrist. (*Id.* at 554). The lease arrangement constitutes the only financial arrangement between the optometrist and Pearle. (*Id.* at 556).

52. Pearle exercises no control over the optometrist. (Kahn 556). The rent paid by the optometrist is not based on the number of patients the optometrist sees. (*Id.* at 558). Patients pay the optometrist directly for the examination and the optometrist owns the patients' records. (*Id.*).

53. Massachusetts law requires that optometrists display their license in a conspicuous place and provide each patient with a memorandum of sale with the optometrist's name, address, and license numbers. Mass. Gen. Laws Ann. ch. 112, § 70. (CX 18I, 18J).

54. The relationship between Pearle and the optometrists with whom it affiliates is similar to the relationship between other chains optical establishments and optometrists. (Convissar 209–11; Rymeski 238–40, 242–43; Feldman 381–87). [10]

2. Size of Market

55. As of September 10, 1985, there were 1894 optometrists holding a valid license to practice optometry in Massachusetts and, of these, 1355 were in active practice. (CX 5F). More than $100 million is spent on eyecare annually in Massachusetts. (Complaint ¶9; Answer ¶9) (Stip.).

3. Interstate Commerce

56. The Board's actions to prohibit truthful advertising by optometrists have a substantial effect on interstate commerce. (F 57–59).

57. The practice of optometry by licensed optometrists in the Commonwealth of Massachusetts is in interstate commerce. (CX 8) (Stip.).

58. The Board, through its restrictions on truthful advertising, has inhibited the ability of interstate optical firms affiliated with Massachusetts optometrists to compete in the market for optical goods and services in Massachusetts. (F 74–76, 78–79). The Board has prevented interstate firms such as American Vision Centers, Sterling Optical, Eye World, and Pearle Vision from engaging in affiliation advertising. (F 74–76, 141–42, 145–46). The Board has discouraged Massachusetts optometrists from advertising their affiliation with Eye World. (F 146). American Vision Centers, which has plans to expand its operations in seven of the nine states in which it operates, is not expanding its operations in Massachusetts because of the Board's restriction on affiliation advertising. (F 79).

59. The restrictions imposed by the Board on price and non-price advertising are likely to raise the price of and restrict access to optometric goods and services in the Commonwealth of Massachusetts, which are in interstate commerce. (F 57–58, 62).

4. Advertising and Competition

60. Advertising lowers out-of-pocket and search costs to consumers. (Kwoka 695–98). The total cost to consumers of purchasing a good or service includes: the price, which is the out-of-pocket cost paid directly to the seller, and the search cost to obtain information necessary to make a buying decision, including the time and expense of travel. (Kwoka 695–96) (Stip.).

61. Advertising is a form of competition like price competition. (Kwoka 698). Advertising may benefit sellers by attracting customers, by facilitating seller's entry into a market or by making possible the expansion of goods and service sold by the seller. (*Id.*). [11]

62. Restrictions on advertising in the market for optometrist goods and services raise prices and total cost to consumers without affecting quality. (Kwoka 712).

63. Dr. Kwoka is one of four authors of the "Staff Report on Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry," also known as the "B.E. Study," which was published in 1980. (CX 318; Kwoka 711–13, 751–52) (Stip.).

64. The B.E. Study examined the contention that advertising has detrimental effects on quality of professional services. (Kwoka 712).

65. The B.E. Study confirms the economic prediction that advertis-

ing has the effect of lowering the total cost of optometric goods and services. (Kwoka 722–24, 729–30; CX 319–20).

66. The B.E. Study shows that advertising did not lead to any significant deterioration in quality. (Kwoka 735–36, 748–49). The B.E. Study shows that, on average, less thorough eye examinations tend to be given by advertising optometrists than by nonadvertising optometrists. (CX 318 at 13; Kwoka 386–89). However, in markets where advertising is allowed, 55% of the optometrists do not advertise and a higher percentage of all optometrists give high quality examinations than in markets where advertising is prohibited. (CX 318 at 13–14).

67. Dr. Edelstein, a licensed optometrist in Massachusetts, advertises primarily through direct mail coupons that offer a $20.00 discount on the fee for a complete pair of prescription eyeglasses. (Edelstein 283–84).

68. Since Dr. Edelstein began advertising discounts, his practice has grown. (*Id.* at 286–87). Dr. Edelstein saw two patients per week when he first began to practice. He now sees over 100 patients per week. (*Id.* at 288–89). The annual income of Dr. Edelstein's practice greatly increased. (*Id.* at 286–87).

69. Without volume, Dr. Edelstein could not provide the services which he now makes available. (*Id.* at 287–88). Dr. Edelstein has over 1000 contact lenses in stock and 30,000 eyeglasses. (*Id.* at 275–76).

70. As a result of his discount advertising, Dr. Edelstein expanded the geographical area that he serves. Dr. Edelstein draws patients from Burlington and Lexington, Massachusetts, towns from which Dr. Volovick draws patients, and Newton, a town from which Dr. Lamont draws his patients. (*Id.* at 292–93; Volovick 660–61; CX 242 at 8–9).

71. Dr. Edelstein surveys competing optometrists to determine their prices. (Edelstein 279–80). Advertising **[12]** optometrists generally charge between $30.00 and $50.00 whereas non-advertising optometrists generally charge between $60.00 and $80.00. (*Id.* at 282).

72. His advertising made patients aware of his lower prices. (Edelstein 305–06, 289–91, 308–09).

73. Dr. Morton Ross, an optometrist, discontinued truthfully advertising discounts after being instructed to do so by the Board. (CX 29 at 10–11, ex. P) (Stip.).

74. Optical establishments compete by enabling consumers to purchase eyeglasses at the same location where they obtain their eye-examination. (Feldman 377–78). This is sometimes referred to as "one stop shopping." (*Id.*) (Stip.).

75. Pearle Vision Centers, which had not engaged in affiliation advertising because it was against Board regulations, changed its

policy 18 months ago. (Kahn 577–79). The number of patients coming to Pearle Vision Centers has increased significantly since Pearle began to advertise the availability of optometrists' services. (*Id.* at 581).

76. Consumers want to know about the availability of an optometrist and 80–99% of consumers purchase eyewear where they get their examination. (Kahn 582; Volovick 664). The increase in the number of patients coming to Pearle was the result of affiliation advertising. (*Id.* at 586–90; Rymeski 241).

77. Prices are lower for eye-examinations and for optical goods in states where advertising is permitted than they are in Massachusetts. (Convissar 218–26).

78. Optometrists affiliated with American Vision Centers charge less for eye-examinations in states where affiliation advertising is permitted. (*Id.* at 218–23):

States Restricting Affiliation Advertising	**Eye Exams**[2]	**Daily Contacts**	**Extended Contacts**
Texas	$35	$75	$100
Massachusetts	$30–40	$50–60	$80–100**[13]**

States Permitting Affiliation Advertising	**Eye Exams**	**Daily Contacts**	**Extended Contacts**
New York	$12–15	$35	$50
Illinois	$12–15	–	–
Missouri	$20	$35	$50
Pennsylvania[3]	$20	$35	$50

79. American Vision is planning to expand its operation in every state in which it operates, except Texas and Massachusetts, where it will not because of advertising restrictions. (Convissar 223–24).

C. The Board and Truthful Advertising

1. Prior to Bates

80. Prior to the Supreme Court decision in *Bates v. Arizona State Bar*, 433 U.S. 350 (1977), Rule 9 of the Board's regulations prohibited all advertising by optometrists. (DiGregorio 637–39).

2. The Board and Bates

81. In 1977, the Board became aware that the Supreme Court in *Bates* had struck down restrictions on truthful advertising. (DiGregorio 641–43). By 1979, the Board still limited "permissible advertis-

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[2] Eye-examinations are conducted only by optometrists. (*Id.* at 221).

[3] The arrangement between American Vision and optometrists in Pennsylvania is similar to Massachusetts since the optometrists are independent of American Vision. (*Id.* at 221).

ing" to information provided by professional cards, telephone directories, and announcements regarding office openings, closings or changes of location. (CX 13I).

82. The Board prohibited affiliation advertising between optometrists and opticians in regulations that took effect on July 1, 1979. Section 3.08 of the Board's regulations prohibited any optometrists from allowing "the use of his name or professional ability by an optical establishment for the financial gain of such establishment." (CX 13H) (Stip.).

83. The Board prohibited advertising of discounts by optometrists in regulations that took effect on July 1, 1979. Section 3.12 of the Board's regulations prohibited any optometrist from "discriminating directly or indirectly in his professional services." (CX 13I). The Board interpreted Section 3.12 to prohibit offering or advertising discounts by optometrists. (CX 29 at 4, 6; CX 261 at 10–11). [14]

3. Criticism By the Office of Consumer Affairs

84. In 1981, the Massachusetts Executive Office of Consumer Affairs ("EOCA") criticized the Board's restrictions on truthful advertising as restraining trade and as contrary to the Supreme Court decision in *Bates*. (F 85–87).

85. The EOCA is a cabinet office whose area of responsibility includes the Board of Registration in Optometry. (Pollock 131, CX 19A to 19D; CX 20A). Although the Board is under the EOCA for organizational purposes, the EOCA does not have the authority to require the Board to modify its regulations. (CX 5U; CX 261 at 32).

86. By letter dated March 30, 1981, Eileen Schell, the Secretary of the EOCA, informed the Board that it should delete Section 3.08 because it constituted a restraint of trade and suggested that the Board delete advertising restrictions that were contrary to *Bates*. (CX 22A-B).

87. On May 13, 1981, Ruth Pollock, General Counsel to EOCA, notified the Board that several regulations including Sections 3.08 and 3.12 were unduly restrictive in light of *Bates*. (Pollock 140–43).

4. Criticism By the State Auditor

88. The Massachusetts Department of the State Auditor ("State Auditor") criticized the Board's restrictions on truthful advertising. (F 89–99).

89. The Department of the State Auditor is a state agency whose responsibility includes auditing state agencies to verify information contained in financial reports and to ensure that the state agencies are operating in accordance with state law. (Gallagher 157–60).

90. In 1982, the State Auditor conducted an audit of 15 of the 28

Boards of Registration in Massachusetts, including respondent, "to determine whether these boards have acted in the consumer's interest when administering the laws and regulations that they are required to enforce." (CX-261 at 1; Gallagher 160).

91. Frank Gallagher, the auditor from the Department of the State Auditor with primary responsibility for the audit of the Board, concluded after an initial review that many of the Board's regulations were contrary to the consumer interest. (Gallagher 166–70). These regulations included Sections 3.08 and 3.12. (*Id.* at 169–70). [15]

92. On June 29, 1983, the State Auditor submitted a draft copy of its report to the Board for comment. (CX 261 at 4). In the draft report, the State Auditor criticized numerous regulations promulgated by the Board, including Sections 3.08 and 3.12. (CX 261 at 34–36).

93. On August 22, 1983, the Board responded by letter to the draft report. (CX 261 at 34–38). The Board stated that Section 3.12 had been eliminated from revised regulations that the Board was preparing. (CX 261 at 36). The Board also objected "to time spent on matters which have become obsolete." (CX 261 at 37). The Board did not inform the State Auditor that its revised regulations, which the Board did not adopt until October, 1984, contained an explicit ban on discount advertising. (Exford 494–96) (Stip.).

94. The Board informed the State Auditor that it intended to retain Section 3.08 as Section 5.06. (CX 261 at 36). The Board stated that its ban on affiliation advertising was justified for the same reasons that justified restrictions on the ability of optometrists to affiliate with non-optometrists. (*Id.* at 14, 36). The Board asserted that restrictions on affiliation were necessary to protect consumers from "mercantile practices" which would result in "undue influence" on optometrists to prescribe unnecessary eyewear and result in lower quality eyecare by setting limits on the nature of an optometrist's practice or the time spent with a patient. (CX 261 at 34–36).

95. After receipt of comments, the State Auditor published a final report. (CX 261, Gallagher 193–94).

96. The State Auditor stated that Section 3.08 "had been implemented to prevent opticians and optometrists from forming business relationships." (CX 261 at 9). The State Auditor concluded that Section 3.08 was "unreasonable" and noted that the EOCA had recommended that "this restriction be discontinued because it unfairly restricts trade." (*Id.*).

97. The State Auditor concluded that the Board's concerns about mercantile practice did not justify retaining Section 3.08 in the Board's revised regulations, stating:

> optometrists are expected to perform their function in a manner that provides profes-

> sional care to the consumer. The board already assures this standard through its regulation on minimum vision analysis procedures and through its consumer complaint process. We believe that existing professional standards offer sufficient assurances [16] of an optometrist's conduct, regardless of whom the optometrist's employer might be.

(*Id.* at 14). The State Auditor recommended that the Board reevaluate Section 3.08. (*Id.* at 15).

98. The State Auditor stated the Board had used Section 3.12 not to protect consumers from higher prices, but to restrain optometrists from offering reduced fees to certain consumer groups, such as senior citizens and company employees. (CX 261 at 10-11). The State Auditor concluded that (*id.*):

> this regulation, does not benefit the consumer because it prevents optometrists from offering their consumers discounts.

99. The State Auditor reiterated the recommendation of the Executive Office of Consumer Affairs that, as a result of the *Bates* decision, " '[a]dvertising can be in any form as long as it is not deceptive or misleading.' " (CX 261 at 13). The State Auditor recommended that the Board (*id.*):

> Modify or eliminate its regulations on advertising restrictions. This action should reflect EOCA's recommendation to eliminate advertising restrictions since such restrictions are contrary to a U.S. Supreme Court ruling on professional advertising in general.

5. 1984 Regulations

100. The Board adopted regulations on October 18, 1984 that contained explicit bans on truthful advertising that in some aspect were more restrictive than the Board's previous regulations. (F 101-03; CX 2D).

101. The Board retained its restriction on affiliation advertising in its 1984 regulations. (CX 14S). Section 5.07(3) of the Board's 1984 regulations states:

> An optometrist shall not permit or authorize the use of his name or professional ability and services by an optical establishment or business. An optometrist shall not permit or authorize establishment or [*sic*] authorize an [17] optical establishment or business to advertise, publicize or imply the availability of his optometric services, (either on or off the premises).

102. The Board added an explicit restriction on discount advertising in its 1984 regulations. (CX 14T). Section 5.11(1)(f) of the Board's 1984 regulations declares "[a]dvertising which offers gratuitous services,

rebates, discounts, refunds or otherwise, with the purpose of increasing the number of private patients" to be contrary to the public interest. (*Id.*). Section 5.11(1)(f) expanded the Board's ban on discount advertising, which under Section 3.12 had been limited to optometric services, to include optical goods. (CX 13I; CX 14T).

103. The Board added two other explicit restrictions on truthful advertising. (CX 14T). Section 5.11(1)(d) declared "advertising which uses testimonials" to be contrary to the public interest. (*Id.*). Section 5.11(1)(a) prohibited advertising that appeared to be "sensational" or "flamboyant." (*Id.*).

6. Federal Trade Commission Investigation

104. The Board became aware of the Federal Trade Commission's investigation in February, 1985. (CX 98B at 3; Rapoport 540–41) (Stip.).

7. Proposed 1985 Regulations

105. On June 27, 1985, the Board published a notice of proposed changes in its regulations in the Massachusetts Register. (CX 5X) (Stip.).

8. Federal Trade Commission Complaint

106. On July 8, 1985, the Federal Trade Commission issued a complaint challenging the Board's restrictions on truthful advertising. (Complaint ¶12, ¶13).

9. EOCA and the Proposed Changes

107. On July 28, 1985, Paula Gold, Secretary of Consumer Affairs and Business Regulation, testified before the Board concerning the Board's proposed changes that had been published on June 27. (CX 21A; CX 102A) (Stip.).

108. Ms. Gold criticized the Board's proposal to retain its restriction on affiliation advertising. (CX 21D-E). [18]

109. Ms. Gold stated that "there is no need for the Board to repeat—or expand" Section 73A's ban on free eye-examinations. (CX 21C).

10. November, 1985 Regulations

110. On November 7, 1985, the Board promulgated revised regulations. (CX 15A) (Stip.).

111. In its November, 1985, regulations, the Board continued to prohibit affiliation advertising. (CX 15A). Section 5.07(3) of the Board's 1985 regulations states that an optometrist "shall not permit or authorize the use of his name, professional ability or services by any person or establishment not duly authorized to practice optome-

try." (*Id.*) In addition, the Board imposed a requirement that "[u]nauthorized advertising or publicizing of a licensee's availability to perform eye-examinations or other professional services shall be immediately reported to the Board by the licensee." (*Id.*) (Stip.).

112. The Board's November, 1985, revised regulations deleted Section 5.11(1)(f), which banned discount advertising, Section 5.11(1)(d), which banned advertising that used testimonials, and Section 5.11(1)(a), which banned advertising that appeared to be "sensational" or "flamboyant." (CX 15B) (Stip.).

113. The revised regulations added Section 5.11(1)(b), which declares as not in the public interest "advertising which offers gratuitous services in violation of Mass. Gen. Laws Ann. ch. 112, § 73A" and Section 5.11(1)(c) "advertising which is not in accordance with applicable law, including, but not limited to, Mass. Gen. Laws Ann. ch. 112, § 73A . . . ." (CX 15B).

114. The revised regulations added Section 5.11(6), which states "[w]hen offering discount fees for services or materials usual and customary fees must be substantiated." (CX 15B) (Stip.).

115. The Board's amended regulations have not been distributed to optometrists in Massachusetts. (Rapoport 538; CX 325).

D. Restraint of Truthful Advertising

1. Discount Advertising

116. From 1981 to October, 1984, the Board interpreted Section 3.12 of its regulations, which prohibited any optometrist from "discriminating directly or indirectly in his professional services," to prohibit truthful advertising by optometrists of **[19]** discounts. (F 118–23). From October, 1984, to November, 1985, Section 5.11(1)(f) of the Board's regulations prohibited "advertising which offers gratuitous services, rebates, discounts, refunds or otherwise, with the purpose of increasing the number of patients." (F 124–32).

117. The Board enforced its regulations against ten optometrists who were truthfully advertising discounts for optometric goods or services. (CX–29 at 1–15; Edelstein 300–01). The Board instructed each optometrist to stop advertising. In no case did the Board have any information that the optometrist was not providing the discounts as advertised. (*Id.*).

118. In 1980 or 1981, Dr. Rapoport sent a letter to Dr. Michael Edelstein, stating that advertising that offered a $15.00 discount off the regular price of eyeglasses in the Boston Globe was illegal and instructing Dr. Edelstein to discontinue the advertisement. (Edelstein 300). Dr. Edelstein provided the discounts as advertised. (*Id.* at 300). When Dr. Edelstein asked Dr. Rapoport for an explanation as to why

best copy available

the advertisement was illegal, Dr. Rapoport stated that the advertisement "discriminated" against anyone who did not have a coupon. (*Id.* at 300–01).

119. In October, 1981, the Board informed Dr. Dana Ricker that by advertising discounts to senior citizens, Dr. Ricker had violated Section 3.12. (CX 29 at 6–7). The Board instructed Dr. Ricker to discontinue advertising discounts. (*Id.*). Dr. Ricker complied with the Board's instruction. (*Id.*) (Stip.).

120. In December, 1981, the Board instructed Dr. Sheldon Strauss that by advertising 15% discounts on optometric goods, he had violated Section 3.12 and instructed Dr. Strauss to discontinue his advertising. (CX 29 at 4). Dr. Strauss complied with the Board's instruction. (*Id.*) (Stip.).

121. In September, 1984, Dr. Robert Golden, an optometrist, complained to the Board that Dr. Ronald Cline was advertising the availability of discounts to senior citizens and a 10% discount on a complete pair of glasses to patients who presented a copy of Dr. Cline's advertisement. (CX 29 at 13–15, ex. V). On September 26, 1984, the Board invited Dr. Cline to attend "an informal conference regarding your type of advertising." (CX 29, ex. W) (Stip.).

122. At an informal conference held on October 10, 1984, the Board informed Dr. Cline that his advertising violated Board regulations and instructed him to discontinue his advertising. (CX 29 at 14). Dr. Cline complied with the Board's instruction. (*Id.*) (Stip.). **[20]**

123. On May 22, 1984, Dr. Carmine Guida, Executive Director of the Massachusetts Society of Optometrists,[4] sent a letter to the Board with a coupon advertisement from Dr. Sheldon Strauss that offered "$20.00 off on a complete pair of glasses." (CX 29 at 5, ex. E, F). Dr. Guida's letter asked whether Dr. Strauss' coupon was "a proper form of advertising." (CX 29, ex. E). After the Board became aware that Dr. Strauss was distributing discount coupons, it informed him that his advertising violated Section 3.12 of the Board's regulations. (CX 29 at 5) (Stip.).

124. On October 3, 1984, the Board sent a letter to Dr. Strauss informing him that the discount coupons violated the Board's rules on advertising. (CX 29 at 5, ex. G). Dr. Strauss provided the discounts as advertised. (CX 29 at 5). On November 14, 1984, Dr. Strauss attended a meeting with the Board at which the Board informed him that Section 5.11(1)(f) prohibited advertising that offered discounts. (*Id.* at 6) (Stip.).

125. In October, 1984, after Dr. Monte Levin distributed coupons

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[4] The Massachusetts Society of Optometrists (MSO) is a voluntary association of licensed optometrists. (Volovick 655). As of February 27, 1986, there were 658 members, about half of the optometrists in the state. (CX 325; CX 5F).

redeemable for $10.00 off the price of prescription eyewear, the Board informed him that advertising the availability of discounts through use of coupons violated Section 5.11(1)(f) of the Board's regulations. (CX 29 at 3). He agreed to stop. (CX 29, ex. D) (Stip.).

126. Professional Practice Builders is an advertising agency that does business with optical establishments. (Convissar 214–15). In November, 1984, the Board informed Professional Practice Builders that it was a violation of Section 5.11(1)(f) of the Board's regulations for optometrists to advertise discounts. (CX 29 at 2) (Stip.).

127. On November 26, 1984, the Board informed Dr. Morton Ross that by advertising a $25.00 discount on optometric services and optical goods, he was in violation of "Massachusetts General Law C. 112 S. 67 section 5.11 that [states] . . . 'Advertising which is not in the public interest include . . . advertising which offers gratuitous services, rebates, discounts, refunds, or otherwise, with the purpose of increasing the number of private patients.' " (CX 29, ex. N). Section 5.11 is, in fact, a regulation promulgated by the Board rather than a Massachusetts statute. (Rapoport 533–34). Dr. Ross notified the Board by letter that he intended to comply with the Board's regulations. (CX 29, ex. O). [21]

128. On December 7, 1984, the Board informed Dr. James Freedman that his use of discount coupons violated "Massachusetts General Law C. 112 S. 67 section 5.11 that [states] 'advertising which is not in the public interest include . . . advertising which offers gratuitous services, rebates, discounts, refunds, or otherwise, with the purpose of increasing the number of private patients.' " (CX 29 at 11, ex. Q1–2, ex. R). Dr. Freedman discontinued advertising discounts. (CX 29 at 12, ex. S).

129. On December 7, 1984, the Board notified Dr. Thomas Anzaldi that his use of discount coupons violated "Massachusetts General Law C. 112 S. 67 section 5.11 that [states] 'advertising which is not in the public interest include . . . advertising which offers gratuitous services, rebates, discounts, refunds, or otherwise, with the purpose of increasing the number of private patients.' " (CX 29 at 13, ex. U). Dr. Anzaldi notified the Board that he would discontinue advertising discounts. (CX 29 at 13).

130. In February, 1985, the Board informed Dr. Jacob Bailen that advertising the availability of discounts to senior citizens violated Section 5.11(1)(f) of the Board regulations. (CX 29 at 2) (Stip.).

131. On May 1, 1985, the Board instructed its attorney and one of the investigators to compile lists of discount advertisers and to send letters to them. (CX 100B). The Board stated that "they will be asked to appear before the Board. If subsequent violations occur, criminal charges will be brought against them." (*Id.*).

132. In May 22, 1985, the Board mailed a "Notice of Informal Conference" concerning a violation of Section 5.11(1)(f) to Dr. Michael Edelstein. (CX 29 at 9, ex. L). The informal conference concerned discount coupons that Dr. Edelstein had distributed in Newton, the location of Dr. Lamont's practice. (Edelstein 302). At an "informal conference," held on June 12, 1985, the Board informed Dr. Edelstein that his use of discount coupons violated Section 5.11(1)(f) of the Board's regulations and instructed Dr. Edelstein to discontinue advertising the availability of discounts. (CX 29 at 9).

133. No evidence was introduced to show that the Board ever charged any optometrist with false or deceptive advertising.

2. Affiliation Advertising

134. In October, 1980, the Board informed Dr. Hong Ming Cheng that, by permitting Mass Optical Centers to advertise the availability of his services, he had violated Section 3.08 of the Board's regulations. The Board also notified Mass Optical Centers. (CX 29 at 22–23) (Stip.). **[22]**

135. Dr. Cheng agreed to instruct Mass Optical to remove the sign advertising the availability of his services and Mass Optical discontinued the advertising. (CX 29 at 23; CX 56) (Stip.).

136. After becoming aware, in October 1980, that A Touch of Glass had advertised the availability of the services of Dr. Kenneth Levine, the Board instructed Dr. Levine that it was a violation of Section 3.08 for Dr. Levine to permit A Touch of Glass to advertise his services. (CX 29 at 25–26). Dr. Levine instructed A Touch of Glass not to advertise the availability of his services. (*Id.* at 26) (Stip.).

137. In May, 1981, the Board instructed Dr. Michael McCarty that it was a violation of Section 3.08 for Dr. McCarty to permit Eye-Deal Vision Centers to advertise the availability of his services. (CX 29 at 36–37). Dr. McCarty instructed Eye-Deal Vision Centers to discontinue advertising the availability of his services and Eye-Deal discontinued the advertising. (*Id.* at 37) (Stip.).

138. After becoming aware, in September 1981, that Optical World had advertised the availability of the services of Dr. John Getter, the Board informed both Dr. Getter and Optical World that such advertising was illegal. Dr. Getter instructed Optical World to stop advertising the availability of his services and Optical World discontinued the advertising. (CX 29 at 30–31) (Stip.).

139. In July of 1982, the Board informed Dr. Leon Litman that the advertisement by an optician of Dr. Litman's services was false and fraudulent. (CX 29 at 33–34). Dr. Litman instructed the optician to stop advertising the availability of his services and the optician did so. (*Id.* at 34) (Stip.).

140. In August of 1982, the Board informed Dr. Charles McKervey too that it was a violation of the Board's regulations to permit Eye World to advertise the availability of his services. (CX 29 at 35–36). At the time of doing so, that Board had no information that any patient of Dr. McKervey's had complained that the advertisement by Eye World of Dr. McKervey's services was deceptive or misleading. (*Id.*) (Stip.).

141. In December 1982, the Board informed Dr. Stanley Glick that it was a violation of Section 3.08 for him to permit Eye World to advertise the availability of his services. (CX 29 at 38–39). Dr. Glick instructed Eye World to stop advertising the availability of his services and Eye World discontinued the advertising. (*Id.* at 38) (Stip.). [23]

142. After the Board became aware, in late December, 1982, that Sterling Optical had advertised the services of Dr. William Killilea, the Board informed Dr. Killilea that it was a violation of Section 3.08 for Sterling Optical to advertise the availability of Dr. Killilea's services. (CX 29 at 24–25). Both the Board and Dr. Killilea instructed Sterling Optical to stop advertising the availability of his services and Sterling Optical discontinued the advertisement. (*Id.* at 24–25) (Stip.).

143. On May 25, 1984, the Massachusetts Society of Optometrists wrote a letter to the Board complaining that Stoneham Optical was advertising the availability of the services of an optometrist. (CX 29 at 31–32, ex. 7). The Board informed Stoneham Optical that it was a violation of Board regulations and state law for Stoneham Optical to advertise the availability of eye-examinations. (*Id.*). Stoneham Optical discontinued advertising the availability of eye-examinations. (*Id.* at 32). At the time that the Board contacted Stoneham Optical, the Board had no information that indicated eye-examinations were being conducted by someone who was not an optometrist. (*Id.* at 32–33).

144. After the Board became aware, on or about June 13, 1984, that Opticians III had advertised the availability of the services of Dr. Gerald Fruitkin, the Board informed Dr. Fruitkin that it was a violation of Board regulations for him to permit Opticians III to advertise the availability of his services. (CX 29 at 28–29). Dr. Fruitkin instructed Opticians III to stop advertising the availability of his services. (*Id.* at 29) (Stip.).

145. After the Board became aware, in January, 1985, that American Vision Center was advertising the availability of optometrists' services, the Board contacted five optometrists whose services had been advertised by American Vision Centers. (CX 29 at 15–22). The Board informed the five optometrists, Dr. Christopher Joseph, Dr. Curtis Frank, Dr. Leon Fishlyn, Dr. Richard Jasiak, and Dr. Peter

Bridges that, by permitting American Vision Center to advertise the availability of their services, they were violating section 5.07(3) of the Board's regulations. (*Id.* at 15, 17–18, 20–21). Each of the optometrists instructed American Vision Center to stop advertising the availability of his services and American Vision Centers discontinued the advertising. (*Id.* at 16–21, ex. DD) (Stip.).

146. On January 9, 1985, the Board became aware that Eye World had advertised the availability of the services of Dr. Kendrik Krosschell. (CX 29 at 27). The Board informed Dr. Krosschell that it was a violation of Section 5.07(3) for him to permit Eye World to advertise the availability of its services. Dr. Krosschell instructed Eye World to stop advertising the **[24]** availability of his services and Eye World discontinued the advertising. (*Id.*).

3. Source of Complaints

147. The records of the Board contain no complaints from the general public about discount or affiliation advertising. (F 148; CX 27; CX 28).

148. The complaints about discount or affiliation advertising have come only from optometrists or from their professional association, The Massachusetts Society of Optometrists. (Edelstein 312–13; CX 111; CX 115; CX 123A; CX 124; CX 125; CX 130; CX 134; CX 136; CX 140; CX 147; CX 150; CX 153A; CX 155A; CX 157; CX 159–60; CX 163A; CX 174; CX 180; CX 184; CX 187; CX 190; CX 192–93; CX 196–97; CX 201–02; CX 206; CX 208–09; CX 211; CX 213; CX 216A; CX 217A; CX 219A).

4. Free Goods

149. Along with a general ban on deceptive advertising by optometrists, Mass. Gen. Laws Ann. ch. 112, § 73A prohibits advertisements that contain "any statement containing the words 'free examination of eyes'; 'free advice'; 'free consultation'; 'consultation without obligation' or any other words or phrases of similar import which convey the impression that the eyes are examined for free." (CX 18P). Section 73A does not prohibit the advertising of free optometric goods, such as contact lenses. (*Id.*).

150. The Board relied on Section 73A as a basis for banning truthful advertising by an optometrist of free goods with a purchase of eyeglasses. (CX 29 at 7–8, ex. H–1, H–2, I, J). In September 1984, the Board informed Dr. Harvey Leavitt that advertising the availability of free goods with the purchase of eyeglasses violated Mass. Gen Laws Ann. ch. 112, § 73A and instructed Dr. Leavitt to discontinue advertising the free goods. Dr. Leavitt complied with the Board's instructions and discontinued his advertising. At the time of instructing Dr. Lea-

vitt to discontinue advertising free contact lenses, the Board had no information that indicated that Dr. Leavitt was not providing free contact lenses as advertised. In fact, Dr. Leavitt was providing free contact lenses as he had advertised. (*Id.*).

5. Appearance of Fee Splitting

151. Section 73B permits optometrists and opticians to affiliate as long as certain conditions are met. (F 48–50). Dr. William Killilea, an optometrist who leased space from Sterling Optical, maintained an office located next to a Sterling Optical store in the Worchester Center Mall. (Rymeski 238–39). Dr. [**25**] Killilea's office complied with the requirements of § 73B. There was a separate entrance to the mall corridor and there was no sharing of fees. (*Id.* at 239, 242).

152. Sterling Optical advertised the availability of Dr. Killilea's services in an advertisement that offered a contact lens package for $88, including a $40 fee for an eye-examination paid directly to Dr. Killilea. (CX 223B; Rymeski 241–42).

153. On February 1, 1983, the Board informed Dr. Killilea that the Sterling Optical advertisement violated Board Regulation 246 C.M.R. 3.08 and that an optometrist may not "appear to" share or split fees with a non-optometrist. (CX 225). No Board regulations prohibited the "appearance of fee-splitting." (CX 13).

154. In response to the Board's allegations of violations of its rules and regulations, Sterling Optical eliminated all mention of Dr. Killilea in its advertisements. (Rymeski 246–47).

6. Connecting Door

155. Section 73B states that an optometrist may locate an office adjacent to that of an optical establishment if the optometrist's office has "a separate entrance and direct entrance from the street, public corridor or area available to the public, whether or not it has an entrance from any other room or area in the same building." (CX 18R).

156. The Board has interpreted Section 73B to prohibit a connecting door between an optometrist's office and an optical establishment. (CX 40B; CX 99A; Rapoport 537–38; DiGregorio 636). The Massachusetts Attorney General notified the Board in 1981 that it would not represent the Board in disciplinary hearings attempting to enforce its interpretation of Section 73B. (CX 71B).

7. Optical Establishments

157. The Board has no jurisdiction over optical establishments. (CX 5P). However, the Board has notified optical establishments that it is

illegal for them to advertise the availability of an optometrist. (F 134, 138, 142–43).

158. The Board also interpreted its regulations to prohibit an optician who is in the employment of an optometrist to advertise on his own, even though no regulation in effect at the time prohibited such advertising. (CX 70A).

159. The Board informed Dr. Krosschell in February, 1985 that he may not include the Eye World logo in his advertisements **[26]** even though no regulation in effect at the time prohibited the use of such a logo by an optometrist. (CX 29 at 27; CX 13).

E. Justifications

1. Discount Advertising

160. The Board has stated with respect to its prohibition on discount advertising that, "Board regulations which had prohibited such advertising represented an implicit regulatory judgment that such advertising was inherently 'deceptive.' " (CX 7B).

161. There is no evidence that optometrists in Massachusetts have falsely or deceptively advertised the availability of discounts. (F 133, 147). There is no documentary evidence of consumer complaints of deceptive advertising of discounts. (F 147). There is no record of any Board investigation or enforcement action concerning an optometrist who deceptively advertised discounts. (F 133).

162. Board enforcement actions were directed at optometrists who, in fact, provide discounts as advertised. (F 117). These actions were in response to complaints from other optometrists. (F 148).

163. The Board has statutory authority to prohibit false or deceptive advertising by optometrists. (CX 18K).

2. Affiliation Advertising

164. Independent optometrists are subject to pressure to over-prescribe as are optometrists who affiliate with non-optometrists. (CX 242 at 42–44).

165. Advertising has the effect of lowering the cost of optometric goods and services without any detrimental effect on quality. (F 65–66). The Board offered several exhibits concerning commercial practice in the market for optometry as "legislative facts" the Board "could have considered." (TR 892–95; RX 5; RX 14–15). These documents were not offered for the truth of the assertions contained therein. (TR 892–95). They add little support to respondent's position. In addition, the Nathan Report (RX 5) is unreliable due to methodological flaws in the preparation of the report. (CX 334–35).

166. The Board has the authority to discipline optometrists who

provide inadequate levels of eye care quality. Mass. Gen. Laws. Ann. ch. 112, § 71. (CX 18K; F 10, 97). The Board did not allege inadequate care against any of the optometrists against whom **[27]** it enforced its restrictions prohibiting affiliation advertising. (F 134–46).

167. The Board enforced its ban on truthful affiliation advertising against optometrists who were engaged in relationships with optical establishments that complied with Section 73B. (F 151–54; CX 56, CX 29 at 22–23).

168. The Board received no complaints from consumers about confusing or deceptive affiliation advertising. (F 147). The Board has enforced its ban on joint advertising in response to complaints from optometrists rather than from consumers. (F 148).

169. Every optometrist must display a license in a conspicuous place and provide each patient with a memorandum of sale that sets forth the optometrist's name, address, and license number. Mass. Gen. Laws Ann. ch. 112, § 70. (CX 18I-J).

170. The Board enforced its ban on affiliation advertising against optometrists who were providing eye examinations as advertised. (F 140, 143).

F. Effects

171. The Board's prohibitions on truthful advertising have restrained competition in the provision of optometric services and optical goods in Massachusetts. (F 172–78).

172. The Board has prevented optometrists from disseminating truthful information concerning the availability of discounts. (F 116–33). The Board's prohibitions on advertising discounts have prevented optometrists from competing on the basis of price by preventing them from informing consumers of the availability of lower prices in the form of discounts. In addition, the Board's prohibitions on discount advertising have prevented optometrists from competing on the basis of service by restricting the ability of optometrists to develop high volume practices that could provide consumers with a greater range of choice in selecting eye care services. (*Id.*; F 68–69).

173. The Board has prevented optometrists from disseminating truthful information concerning affiliations with optical establishments. (F 134–46). The Board's prohibitions on affiliation advertising prevent optometrists from competing on the basis of the convenient service and lower prices that can be realized through affiliations with optical establishments by preventing optometrists from publicizing their affiliations to consumers. (*Id.*; F 74, 77).

174. By prohibiting affiliation advertising, the Board has restricted the ability of optical establishments to compete on the **[28]** basis of convenient service by preventing optical establishments from adver-

tising the availability of the services of an optometrist and reduced the incentive for optical establishments to affiliate with optometrists in Massachusetts. (F 79, 134–46).

175. By prohibiting affiliation advertising, the Board has restricted the ability of optometrists to enter into lawful affiliations with optical establishments by reducing incentives for optical establishments to enter into the Massachusetts market. (F 79).

176. The Board has deprived consumers of the benefits of price and service competition among optometrists by preventing optometrists from advertising discounts and affiliations with optical establishments and by insulating traditional optometrists from competition in the form of advertising. (F 60–61, 72, 116–46).

177. The Board's prohibitions on truthful advertising are likely to cause higher prices for optometric services and optical goods in Massachusetts. (F 60–65, 71, 77–79).

178. The Board's prohibitions on truthful advertising are likely to cause consumers to pay higher prices for optometric goods and to delay or forgo purchases of needed optometric services or optical goods. (F 65).

G. Relief

1. Affiliation Advertising

179. The Board continues to ban all forms of affiliation advertising without regard to the truth or falsity of the advertising. (F 111).

2. Discount Advertising

180. The Board has not repudiated its judgment that discount advertising is inherently deceptive. (F 160).

181. The Board took action to amend its regulations four months after being notified of the Commission's investigation and a few days before the complaint was issued. (F 104–06). Four months after the complaint was issued, the Board adopted regulations that repealed its previous explicit ban. (F 106, 110). The Board's amended regulations do not eliminate restrictions on truthful advertising of discounts. (F 113). The Board's November 1985 regulations add a requirement that optometrists substantiate usual and customary fees when advertising discounts. (F 114). **[29]**

182. In addition, the Board adopted another regulation that specifically bans advertising that offers gratuitous services in violation of Section 73A. (F 113). The Board has relied on Section 73A to ban advertising of free goods. (F 149–50).

183. Fifteen days before publishing its proposal to amend its regulations on June 27, 1985, the Board told an optometrist that advertising

the availability of discounts was illegal and instructed him to discontinue his advertising. (F 132).

3. Danger of Continuing Effects

184. Although some optometrists have not understood its advertising prohibitions (CX 29, ex. D, ex. P, ex. Z, ex. BB), the Board has provided no guidance as to the meaning of the provisions that were added in the November 1985 regulations. (F 20).

185. The Board has not disseminated its revised regulations to optometrists in Massachusetts. (F 115).

186. From at least 1981 to November 1985, optometrists in Massachusetts learned of the Board's ban on discount advertising. (F 118–25, 127–32).

4. Danger of Recurrence

187. The Board has continued to prohibit truthful advertising after being aware of: the Supreme Court decision in *Bates*, the Massachusetts statute prohibiting it from restricting truthful advertising, and the criticism of the EOCA and the State Auditor. (F 11, 81, 84, 88, 101–03, 108–14, 117, 134–46).

II. CONCLUSIONS OF LAW

188. The Federal Trade Commission has jurisdiction over the respondent and over the subject matter of this proceeding.

a. The respondent is a "person" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

b. The challenged acts and practices of respondent are in, or affect, commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

189. Respondent has acted as a combination or conspiracy of its members to restrain competition among optometrists in the Commonwealth of Massachusetts by: **[30]**

a. Restricting or prohibiting truthful advertising by optometrists.

b. Prohibiting optometrists from truthfully advertising discounts from their usual prices or fees.

c. Prohibiting optometrists from permitting optical establishments or other persons or entities not licensed to practice optometry to truthfully advertise the optometrists' names or the availability of their services.

d. Prohibiting optometrists from making use of truthful advertising that contains testimonials or that is "sensational" or "flamboyant."

190. The combination or conspiracy, and the acts and practices

committed in furtherance thereof, have eliminated, restricted, restrained, foreclosed, and frustrated competition among optometrists, and have caused injury to the public.

191. The combination or conspiracy, and the acts and practices committed in furtherance thereof, constitute unfair methods of competition, and unfair acts or practices in or affecting commerce, and are in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

192. The order entered in this proceeding is necessary to remedy the violations of law committed by respondent and to protect the public now and in the future.

III. ANALYSIS

More than $100 million is spent on eyecare annually in Massachusetts. This case involves a branch of that market—almost two thousand optometrists licensed in Massachusetts by the respondent Board, a state agency. (F 55).

Traditionally, an optometrist has worked alone or in a small office, relying on word-of-mouth referrals from former patients and shunning growth through commercial practices such as price competition and advertising. In recent years the crumbling barriers to professional commercialization as well as the booming industry for retailing eyecare products through chain stores and franchised operations, featuring heavy advertising, lower prices and greater service, have pressured optometrists to compete more vigorously. The Board, controlled by its optometrist members, has attempted to slow this change. [31]

To preserve the traditional practice, the Board has passed and enforced a series of rules banning: advertising of price discounts, advertising of a lawful affiliation between the optometrist and a retail optical store, as well as testimonials and sensational or flamboyant advertising. The Board argues that the traditional practice results in higher quality eyecare. While this is disputed, there is little doubt that the Board's policy has meant higher prices for optical goods and services in the Commonwealth of Massachusetts.

This case questions whether the Board's policy is truly the political decision of a disinterested state agency taken in the interest of the public health and safety, considering the fact that it is controlled by practicing optometrists who benefit financially from this trade restraint.

A. Combination or Conspiracy

The complaint here attacks respondent's "combination or conspiracy." These terms are derived from the Sherman Act which prohibits every "contract, combination . . . or conspiracy in restraint of trade." (15 U.S.C. 1). The gist of these terms is "whether or not there is a collaborative element present." *Pearl Brewing Co. v. Anheuser-Busch, Inc.*, 339 F.Supp. 945, 951 (S.D. Tex. 1972).[5] Complaint counsel must, therefore, establish concerted activity which deprives the market of the "independent centers of decisionmaking that competition assumes and demands." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768–69 (1984). The concerted activity must be among "two or more separate entities." *Fisher v. City of Berkeley*, 106 S.Ct. 1045, 1049 (1986).

Fisher involved a municipal rent control ordinance. The rent ceilings established by the ordinance were enforced by the Berkeley Rent Stabilization Board. Landlords subject to the ordinance alleged that it violated the Sherman Act, being a combination between the government and the landlords, as well as a horizontal combination among the landlords, in restraint of trade. *Id.* at 1049. The Supreme Court held that a restraint imposed unilaterally by a government agency does not become concerted action within the **[32]** meaning of the Sherman Act because it has a coercive effect upon parties who must obey the law, and that merely because the competing landlords must comply with the ordinance is not enough to establish a conspiracy among them. *Id.* at 1049–50. In the absence of concerted action there was no Section 1 Sherman Act violation.

Complaint counsel—recognizing the holding of *Fisher*—no longer rely on their theory of conspiracy between the Massachusetts Board of Optometry and the optometrists it regulates.[6] Complaint counsel argue, however, that *Fisher* does not answer the remaining question of whether the Board members by themselves can conspire to violate the antitrust laws.

There is nothing in the *Fisher* opinion to show that the Berkeley Rent Stabilization Board was controlled by competing landlords, or that the Rent Board members were alleged to have conspired among themselves.[7] Thus, the question remains whether the respondent members of a state agency can be held to have conspired by themselves in violation of the antitrust laws.[8]

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[5] It has been suggested that the terms are synonymous. *Id.* at 950, n. 1. Since there is a presumption against the use of redundant words in a statute, *FTC v. Retail Credit Co.*, 515 F.2d 988, 994 (D.C. Cir. 1975), the terms probably have slightly different meanings. It may be that an unlawful "combination" can be established by evidence falling somewhat short of that necessary to establish an unlawful "conspiracy." Oppenheim, Federal Antitrust Laws, p. 178 n. 1 (3rd Ed. 1968).

[6] Complaint counsel's brief dated March 12, 1986 at p. 4, n. 1.

[7] *Fisher* is also distinguished in that the ordinance alleged to be anticompetitive was enacted by populate initiative, a highly unlikely means of conspiracy.

[8] *Goldfarb* does not control this issue. There, the conspiracy was by the Fairfax County Bar Association, a voluntary association of lawyers. Enforcement was by the State Bar, an administrative agency of the state, 421 U.S. at 776: "The State Bar . . . joined in what is essentially a private anticompetitive activity . . . ." 421 U.S. at 792.

Respondent argues that the Board acts as a unit, citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). That case held a parent corporation incapable of conspiring with its wholly-owned subsidiary. The Court reasoned that "the officers of a single firm are not separate actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." 467 U.S. at 769. The Court stressed that concerted activity "inherently is fraught with anticompetitive risk," because "[it] deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands," while coordination within a single firm may be necessary for the enterprise to compete effectively. 467 U.S. at 768–69. Thus the issue is whether the optometrists on the Board are "separate actors pursuing separate economic interests" and "independent centers of decisionmaking," capable of conspiring together. [33]

This issue of conspiracy is one of fact.[9] And, while there is a presumption of honesty and integrity in the conduct of public officials,[10] less evidence will be necessary to shift the burden of proceeding where a state regulatory board is controlled by members of a profession and the board regulates commercial practices of that profession, since the board members' pecuniary interest may be stronger than their duty to the public in deciding such issues.[11]

The evidence in this case shows that the Board is composed of four optometrists and one public member. (F 3). Board decisions are made by majority vote. (F 5). The Board's decisions are controlled by its four optometrist members.[12] (F 3–6). The optometrists serving on the Board continue to engage in the private practice of optometry during their tenure on the Board. (F 4). The Board members are not public employees, and receive only reimbursement for necessary expenses and a minimal honorarium. (F 4).

The Board's optometrist members do not advertise or affiliate with opticians or "commercial" retailers. (F 21). They do not offer discounts. (F 40). They believe that advertising, offering discounts, or affiliating with optical establishments are inconsistent with optometry's status as a learned profession. (F 34). The Board's restrictions on truthful advertising benefit the Board's optometrist members by insulating them from competition. **[34]** (F 21, 34, 70, 72, 79). They have an individual, personal stake in competitive conditions in the market they regulate.[13]

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[9] Substance should prevail over form in determining whether conduct is unilateral action by a single entity or concerted behavior by persons with an independent personal stake. *Copperweld Corp.*, 467 U.S. at 768; *United States v. Sealy, Inc.*, 388 U.S. 350, 353 (1967).

[10] *Town of Hallie v. City of Eau Claire*, 105 S.Ct. 1713, 1720 (1985); *Federal Prescription Service v. American Pharmaceutical Ass'n*, 663 F.2d 253, 264 (D.C. Cir. 1981); *American Optometric Ass'n v. FTC*, 626 F.2d 896, 913 (D.C. Cir. 1980).

[11] In *Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973), the Court held that a state board composed of optometrists in private practice was constitutionally disqualified from conducting hearings looking toward the revocation of plaintiff's license to practice optometry because the revocation would possibly rebound to the personal benefit of members of the board.

[12] The public member has not participated in any of the Board's activities since December 1982. (F 3).

The optometrist members of the Board are individuals capable of conspiring together. Each optometrist on the Board is principally engaged in the private practice of optometry in the market that the Board regulates. The regulations at issue in this case, which the Board optometrist members have combined to pass and enforce, have adversely affected chain optical establishments, as well as other optometrists, competing with Board members. (F 25, 70, 79, 132). Furthermore, in the absence of those regulations, the Board optometrists would compete with each other by individually deciding whether to advertise.

The members of the Board have not pooled their capital and do not share the risk of loss or opportunity for profit. The Board members have separate economic identities, and thus engage in a combination when they act together on the Board. *Arizona v. Maricopa*, 457 U.S. 332, 356–57 (1982). Substance should prevail over form in determining whether conduct is unilateral action by a single entity or concerted behavior. *Copperweld*, 467 U.S. at 771–74. The optometrists on the Board do not lose these separate identities by being Board members. The issue is decided by "the identity of the persons who act, rather than the label of their hats." *United States v. Sealy, Inc.*, 388 U.S. 350, 353 (1967).[14]

Respondent has, therefore, engaged in a combination and conspiracy as alleged in the complaint.

B. Unfair Methods of Competition

Respondent has banned advertising of discount prices by optometrists and of optometric services offered by retail optical stores. Since all of the challenged restrictions are the product **[35]** of a "combination or conspiracy," if they are unreasonably anticompetitive respondent has violated Section 1 of the Sherman Act and thereby Section 5 of the Federal Trade Commission Act.[15]

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[13] Optometrists on the Board are independent centers of decisionmaking because they have an "independent personal stake." *Copperweld*, 467 U.S. at 769–70 n. 15. In *Greenville Publishing Co. v. the Daily Reflector*, 496 F.2d 391, 399–400 (4th Cir. 1974) a corporation was held to have conspired with the president of the corporation because he had "an independent personal stake in achieving the corporation's illegal objective."

[14] In *Sealy*, the Court found that thirty independent licensees used their joint ownership of their licensor corporation to effect a horizontal conspiracy to allocate sales territories and fix prices in violation of Section 1 of the Sherman Act. The fact that the single licensor corporation was the "instrumentality of the licensees' " agreement did not obscure the fact that independent competitors had combined. 388 U.S. at 352–54.

[15] Violations of the Sherman Act are violations of Section 5 of the FTC Act. *FTC v. Cement Institute*, 333 U.S. 683, 690–92 (1948).

1. Restrictions on Advertising

Bates v. State Bar of Arizona, 433 U.S. 350 (1977), held that restraints on advertising of professional services violate the First Amendment. Soon thereafter, in 1978, the Massachusetts Legislature adopted legislation requiring its boards regulating professions to comply with *Bates*. The Legislature declared that any regulations adopted by state agencies limiting "competitive advertising relating to the sale price of consumer goods or services" were "void as against public policy." Mass. Gen. Ann. Laws, ch. 112, § 61. (F 11).

In 1979, the Board's regulations still limited "permissible advertising" to information provided by professional cards, telephone directories, and announcements regarding office openings, closings or changes of location. (F 81). Its regulations also prohibited optometrists from permitting the use of their "name or professional ability" by retail sellers of optical goods (§ 3.08), and barred "discrimination" in fees for professional services (§ 3.12). (F 82, 83). The Board construed "discrimination" as being the advertising of discounts or the offering of discounts. (F 83, 118–20).

In 1981, the Massachusetts Executive Office of Consumer Affairs advised the Board that several of its regulations were anticompetitive and contrary to the *Bates* decision. (F 84–87). In May 1981, the General Counsel of EOCA told the Board that its anticompetitive regulations would make the Board vulnerable to an antitrust suit. (F 87). Respondent continued to enforce its advertising prohibitions. (F 119–20).

In 1982, the Massachusetts Department of the State Auditor reviewed the regulations of respondent. The State Auditor concluded that the Board was improperly restraining advertising and competition. (F 92–99).

The Board did revise some of its regulations following this criticism. The revised regulations adopted in October 1984, however, were in some respects more anticompetitive than the prior regulations. (F 100–03). The restraint on discount advertising was expanded to cover goods as well as services. (F 102, 149–50). The Board retained its ban on affiliation advertising. (F 101). The Board added a ban on testimonials and sensational or **[36]** flamboyant advertising. (F 103). The Board's enforcement of the 1984 regulations was vigorous and effective. (F 116–17).

The Board knew of the Federal Trade Commission's investigation in February 1985. (F 104). In May 1985 the Board considered criminal prosecution of optometrists advertising discounts. (F 131). On June 27, 1985, eight years to the day since *Bates* and eleven days prior to the issuance of the complaint in this case, the Board proposed new regulations, which became effective in November 1985. (F 105–06, 110–14).

These revisions eliminated some bans on truthful advertising, including the ban on discount advertising, but retained others, including the ban on advertising of an affiliation between an optometrist and a retail optical establishment, despite renewed criticism from the EOCA about this provision. (F 107–09, 111–12).

2. Advertising as Competition

Advertising plays an "indispensable role in the allocation of resources in a free enterprise system." *Bates*, 433 U.S. at 364; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976); *American Medical Ass'n*, 94 FTC 701, 1005 (1979), *aff'd*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 445 U.S. 676 (1982). (F 60–66). Restraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects. "[T]he nature or character of these restrictions is sufficient alone to establish their anticompetitive quality." 94 FTC at 1005.

Just as the advertising ban in the *American Medical Ass'n* case was inherently anticompetitive so too are the Board's restraints. The Board has imposed total bans on general categories of advertising. As the Commission stated in discussing the order it issued in the *American Medical Ass'n* case, "[a]cross-the-board bans on entire categories of representations or general restrictions applicable to any representation made through a specific medium are highly suspect." 94 FTC at 1030.

While this case parallels *American Medical Ass'n*, it presents an important additional factor. The advertising restraints at issue in this case have the force of law. Optometrists who violate the Board's commands may lose their professional license, and thereby their livelihood. The Board's restraint on discount price advertising is especially pernicious. By informing the public, price advertising places pressure on sellers to reduce prices, and instills cost consciousness in providers of services. *American Medical Ass'n* at 1005, 1011.

Banning advertisements of discounts impedes entry by new optometrists that depend on a high volume of patients. (F 68–69). Discounts also attract patients during times of low demand. (F 61, 68). A prohibition on discount advertisements obstructs such efforts to promote efficient use of resources. By preventing **[37]** optometrists from informing consumers that discounts are available, the Board eliminates a form of price competition. (F 72, 77, 80). *American Medical Ass'n*, 94 FTC at 1005. Advertising of discounts benefits both buyers and sellers and improves the functioning of the market. (F 60–62, 65). Consumers respond to discount advertising, enabling the optometrist to maintain a larger inventory of lenses and to employ economies of scale, keeping prices low while offering consumers greater choice. (F 68–70).

Massachusetts statutes and regulations permit optometrists to affiliate with a retail optical store, so long as certain conditions are met. The optometrist must, for example, practice on "separate premises" from the optician, which may include an office next door with a separate public entrance. Mass. Gen. Laws Ann. ch. 112, § 73B. (CX 18–R). The Board, however, tried to prevent retail optical stores from informing the public of these lawful affiliations and of the availability of the optometrist's services. (F 82, 101, 111, 134–46).

A ban on truthful advertising of an affiliation between an optometrist and a retail optical store makes entry by retail optical chains more difficult. (F 79). Many consumers prefer the convenience of "one-stop shopping" available when retail optical chains affiliate with optometrists. (F 74, 76). Large optical establishments achieve economies of scale that enable them to offer lower prices. (F 60). They compete successfully by advertising availability of the optometrist. (F 76). Respondent's ban on affiliation advertising has posed a barrier to entry by optical establishments into Massachusetts. (F 79). Prices are lower in states where affiliation advertising is permitted. (F 78).

The Board's ban on the use of testimonials and sensational or flamboyant advertising is also anticompetitive and injures consumers. (F 103). Testimonials may convey useful information. Like the use of illustrations, these advertising methods attract the attention of the audience to the advertising message. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 105 S.Ct. 2265 (1985).

3. *Per Se* Doctrine

The Supreme Court in *NCAA v. Board of Regents of the University of Oklahoma*, 104 S.Ct. 2948, 2962 (1984) explained the *per se* doctrine:

> *Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product [**38**] of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition. . . . [T]he criterion to be used in judging the validity of a restraint on trade is its impact on competition. (Citations omitted.)

The *per se* presumption may be used if a restraint is facially anticompetitive, and it has no redeeming virtue. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19–20 (1979).

The likelihood that horizontal price restrictions are anticompetitive is generally sufficient to justify application of the *per se* rule without inquiry into the special characteristics of a particular industry. *NCCA*, 104 S.Ct. at 2960, n. 21. Agreements among competitors to limit discounts are illegal *per se*. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648–50 (1980). While the Supreme Court has been slow to condemn rules adopted by professional associations as presumptively unreasonable,[16] if the rule plainly affects price the *per se* presumption will be used. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348–49 (1982); *Goldfarb v. Virginia State Bar*, 421 F.2d 773, 782 (1975). Restrictions on price advertising are *per se* unlawful because they are aimed at "affecting the market price." *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688, 691 (7th Cir. 1961). A restraint on price competition imposed by a state board like respondent has been held to be *per se* unlawful. *United States v. Texas State Board of Public Accountancy*, 464 F.Supp. 400, 402–03 (W.D. Tex. 1978), *aff'd* as modified, 592 F.2d 919 (5th Cir.), *cert. denied*, 444 U.S. 925 (1979).[17]

The Board informed the State Auditor that its ban on discount advertising was intended to prevent optometrists from charging certain persons higher than usual fees. A horizontal agreement to fix maximum prices is *per se* unlawful. *Maricopa*, 457 U.S. at 348. Moreover, the State Auditor found that: "Contrary to this stated intent, however, the board has invoked the regulation to restrain optometrists from offering reduced **[39]** fees to certain consumer groups, such as senior citizens and company employees." (CX 261 at 10; F 83).

The Board has prohibited the advertising of discounts on optical goods or services by optometrists. (F 83, 102). The Board has enforced this ban. (F 117–19, 123, 126–27). This conduct is therefore illegal *per se*.

There is not, however, similar precedent holding that banning affiliation advertising, testimonials, and sensational or flamboyant advertising is a *per se* violation of the antitrust laws. Judicial inexperience counsels against extending the reach of *per se* rules. *NCAA*, 104 S.Ct. at 2960, n. 21. This conduct should therefore be judged under the rule of reason.

4. Rule of Reason Doctrine

The test of legality under the rule of reason is whether the restraint imposed merely regulates and perhaps thereby promotes competition or whether it may suppress or even destroy competition. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). "[T]here is often no bright line separating *per se* from Rule of Reason analysis," *NCAA*, 104 S.Ct. at 2962, n. 26 (1984), and a restraint may be held unlawful under the rule of reason without an elaborate market analysis, *American Medical Ass'n*, 94 FTC at 1004–1006. If the restraint causes anticompetitive effects, respondent has a heavy burden to demonstrate the existence of a procompetitive justification. *NCAA*, 104 S.Ct. at 2967. "Absent some countervailing procompetitive virtue —such as, for example, the creation of efficiencies in the operation of a market . . . such an agreement limiting customer choice by impeding the 'ordinary give and take of the market place' . . . cannot be sustained under the Rule of Reason." *FTC v. Indiana Fed. Dentist*, 54 L.W. at 4535. Where there is no plausible procompetitive justification for restrictive conduct the rule of reason can be applied "in the twinkling of an eye." *NCAA*, 104 S.Ct. at 2965 n. 39. A procompetitive justification must be reasonably necessary and narrowly tailored to achieve the procompetitive goal. *American Medical Ass'n*, 94 FTC at 1009–10.

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[16] *FTC v. Indiana Fed. of Dentists*, 54 L.W. 4531, 4534 (decided June 2, 1986).

[17] The theory of the conspiracy finding of the district court in *Texas State Board of Accountancy* has been overruled by *Fisher*, 106 S.Ct. at 1049–50.

Although the Board's conduct banning the advertising of discounts has been held subject to the *per se* rule, *supra*, in order to promote litigation efficiency it will also be analyzed under the rule of reason. *General Leaseway, Inc. v. Nat'l Truck Leasing Corp.*, 744 F.2d 588, 596 (7th Cir. 1984).

The Board's regulations have restrained Massachusetts optometrists from providing consumers with truthful information about the prices and services they offer. Optometrists were stopped from advertising discount prices. (F 119–20, 122, 125, 127–29). The Board stopped retail optical stores from informing [40] the public of their lawful affiliation with an optometrist and of the availability of the optometrist's services. (F 135–39, 141–46). Respondent's restraints have had an actual anticompetitive effect in the marketplace. (F 171).

At trial, respondent did not offer or prove a procompetitive justification for its restraints on discount advertising.[18] The only defense respondent offered related to its ban on affiliation advertising, arguing that it is designed to reduce the risk of harm to the public from unrestrained competition in optometry.

Respondent argues that affiliation may cause optometrists to provide lower quality care,[19] either because a lay person may interfere with the optometrist's independent professional judgment, or because the "commercial motivation" of the [41] optometrist may lessen professional standards.[20] Respondent can uphold professional standards and prevent shoddy work by optometrists by enforcing its disciplinary regulations. (F 9–10). *Bates*, 433 U.S. at 378. And the view that professions are "above" trade is an anachronism. *Bates*, 433 U.S. at 368–72.

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[18] Respondent argued in its pretrial brief that its restraints on advertising may prevent increased concentration in the retail optical industry and that this amounts to a procompetitive justification. Increased concentration in a market, however, does not necessarily result in anticompetitive behavior between the remaining competitors. The BE study found prices lower on the average in non-restrictive cities where large chain stores and advertising optometrists enjoyed a large percentage of the market. (CX 318 at 4). The BE study found a greater number of optometrists giving higher quality examinations in non-restrictive cities. (CX 318 at 13). Further, optometrists compete with ophthalmologists and opticians to provide eye care services and goods to the public. Respondent failed to prove that the increase in market share by large chain stores would necessarily result in anticompetitive behavior.

[19] While arguing that the Board's reasons for adopting the ban were irrelevant, respondent offered newspaper and magazine articles and an economic report to show what the Board could have relied on in passing the rule banning affiliation advertising. This rationalization lacked materiality. (F 165). Furthermore, even though comity requires respect for the Board's action, it is likely that the Board had a responsibility to explain the rationale and factual basis for its rule. *Cf., Bowen v. American Hospital Ass'n*, 54 L.W. 4579, 4583–84 (decided June 9, 1986).

The Board argues that advertising of discounts and affiliation advertising may be inherently deceptive. In this case, there is no proof that the prohibited advertising has deceived the public. Preventing deception cannot justify a total ban on truthful advertising. *Bates*, 433 U.S. at 372–75; *American Medical Ass'n* at 1009–10.

Respondent argues that its affiliation advertising ban prevents consumers from being misled into believing that they are getting a better deal at a large chain store when in fact they might only receive a better price but inferior eye care. This ban is an overbroad[21] suppression of truthful commercial speech. *Bates*, 433 U.S. at 376–77. The Board can stop shoddy work directly without broadly prohibiting advertising competition. (F 10).

Respondent made no attempt to justify its bans on testimonials and sensational or flamboyant advertising. Bans on testimonials or undignified advertising are overbroad. "[T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it." *Zauderer*, 105 S.Ct. at 2280; *In re R.M.J.*, 455 U.S. 191 (1982); *American Medical Ass'n*, 94 FTC at 1023–24.

The Board has market power.[22] The Board's disciplinary powers give it the ability to impose sanctions on any optometrist [42] who fails to obey its rules and regulations. (F 10). The Board can impose its restraints on the market for optometric goods and services throughout Massachusetts. (F 7). Under the rule of reason, respondent's conduct is anticompetitive and therefore unlawful under Section 5.

C. Unfair Acts and Practices

The benefit of truthful advertising to consumers is well recognized, *Virginia Pharmacy Board*, 425 U.S. at 765:

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[20] Respondent cites *Friedman v. Rogers*, 440 U.S. 1 (1979). There, the Court upheld the Texas Legislature's ban on the use of trade names because the legislature had found that there was a "considerable history in Texas of deception and abuse worked upon the consuming public through use of trade names." *In re R.M.J.*, 455 U.S. 191, 202 (1982). There is no evidence here, however, of deception of the public through affiliation advertising.

[21] "[T]he States may not place absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. at 203.

[22] Because of the proof of actual detrimental effects and the lack of competitive justification for respondent's practices, there was no need for detailed market analysis in this case. *FTC v. Indiana Fed. of Dentists*, 54 L.W. at 4535.

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Restraints on advertising are unfair under Section 5. *American Medical Ass'n,* 94 FTC at 1010–11.

The Commission has held that acts or practices that injure consumers are unfair where the injury is substantial, and is not offset by consumer or competitive benefits, and where consumers could not reasonably have avoided it. *International Harvester,* 104 FTC 949, 1061 (1984). Respondent's advertising restrictions cause Massachusetts consumers to pay higher prices for optometric goods and services. (F 60–66). These restrictions also force consumers to spend additional time and money in order to obtain information about optometric goods and services. (F 60, 67–68, 75–76, 116–17). An increase in the price and in the cost of obtaining information about those goods is a substantial injury to consumers. (F 55).

Respondent's restrictions on the advertising of truthful, nondeceptive information provide no benefits to consumers that outweigh the consumer injury caused by those restrictions. Respondent has offered no credible evidence of any concrete [43] benefit caused by its advertising restrictions.[23] The Supreme Court has noted that "we view as dubious any justification [for advertising restrictions] that is based on the benefits of public ignorance."[24] *Bates,* 433 U.S. at 375.

The consumer injury caused by respondent's advertising restrictions can not reasonably be avoided. Respondent's advertising restrictions apply to all licensed optometrists practicing in Massachusetts.[25] Respondent's advertising restrictions are unfair acts and practices in violation of Section 5.

D. State Action Defense

Parker v. Brown, 317 U.S. 341, 344–45 (1943) held that the Sherman Act was not intended to apply to certain state action. Respondent argues that because it is a state agency it is entitled to the state agency exemption. Not every act by a state agency, however, is an exempt act.

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[23] In *Bates,* the Court noted that "[r]estraints on advertising . . . are an ineffective way of deterring shoddy work. An attorney who is inclined to cut quality will do so regardless of the rule on advertising." *Bates,* 433 U.S. at 378.

[24] The Supreme Court has called restrictions on advertising "highly paternalistic." The Court noted that the preferred alternative is "to assume that this information is not in itself harmful, that people will perceive their best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Virginia Pharmacy Board,* 425 U.S. at 770.

[25] Massachusetts law authorizes respondent to discipline optometrists and also provides for criminal penalties for violating respondent's regulations. (F 10).

To be exempt, the agency's acts must be clearly authorized and supervised by the sovereign state. *Hoover v. Ronwin*, 466 U.S. 558, 568–69 (1984). A state agency acting without clear direction by a sovereign state authority does not gain the exemption. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790–91 (1975).

In *Goldfarb*, the Court found the Virginia State Bar to be a "state agency by law" engaged in an unauthorized restraint of trade by promulgating a minimum fee schedule and, in considering whether the Bar had *Parker* immunity, the Court ruled that: "[t]he fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to **[44]** foster anticompetitive practices for the benefit of its members."[26] 421 U.S. at 791. In subsequent opinions, the Supreme Court has reaffirmed its holding in *Goldfarb* that state agencies are not sovereign entities entitled to automatic state action immunity.[27]

A state agency, simply by reason of its status as such, does not, therefore, qualify as the state acting in its sovereign capacity. Action by a state agency may, however, reflect state policy to displace competition with regulation. Such action will not violate the federal antitrust laws provided an "adequate state mandate for anticompetitive activities" exists. *City of Lafayette*, 435 U.S. at 415. This mandate exists when it is found **[45]** "that the legislature contemplated the kind of action complained of." *Id.*[28]

To determine whether the independent acts of the Board as a nonsovereign state representative should be imputed to the Commonwealth of Massachusetts, facts must be analyzed under the standard of *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980): "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."[29]

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[26] The Virginia State Bar was a state agency for the purpose of issuing ethical opinions, one of which contained the anticompetitive fee schedule. *See* 421 U.S. at 776, n. 2.

[27] A plurality of the Court stated in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408 (1978) (opinion of Brennan, J.), that "[p]lainly petitioners are in error in arguing that *Parker* held that all governmental entities, whether state agencies or subdivisions of a state, are, simply by reason of their status as such, exempt from the antitrust laws." In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. 1721 (1985), the Court cited with approval the statement in *City of Lafayette* that " '*Goldfarb* . . . made it clear that, for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign.' " *Id.* at 1729, *quoting City of Lafayette*, 435 U.S. at 410 (opinion of Brennan, J). In *Southern Motor Carriers*, the Court stated that while the public service commissions of four states permitted collective rate-making by private common carriers, these state agencies, "[a]cting alone . . . could not immunize private anticompetitive conduct." 105 S.Ct. at 1730. Only the state legislatures, as sovereign bodies, could do so. The collective rate-making was found to be immune only because it was "clearly sanctioned by the legislatures." *Id.*

[28] *Hoover v. Ronwin*, 466 U.S. 558 (1984) is an example of a case where Parker immunity applied because the acts complained of were those of the state supreme court directing and controlling a state agency, the bar examination committee. There the Arizona Supreme Court gave the state bar committee discretion in compiling and grading bar exams but retained strict supervisory power and ultimate full authority over its actions; the court rules specified the subjects tested and the qualifications of applicants; the grading system created by the committee had to be approved by the court, the committee authority was limited to recommendations and the court itself made final decisions to grant or deny applications for admissions; and aggrieved applicants were authorized to file petitions for reconsideration directly to the court—the denial of an applicant was the act of the Supreme Court and was immune under *Parker*. 466 U.S. at 572–73. The Court note that: "Our attention has not been drawn to any trade or . . . profession [other than law] in which the licensing of its members is determined directly by the sovereign itself—here the State Supreme Court." 466 U.S. at 581, n. 34.

In order to satisfy the requirements of *Midcal*, respondent must first establish that its restraints on truthful advertising by optometrists were imposed pursuant to a clearly articulated and affirmatively expressed state policy. *Midcal*, 445 U.S. at 105. It is not enough to show that the state's position was one **[46]** of "mere neutrality" concerning truthful advertising. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 55 (1982).

In the Massachusetts statutes cited by respondent there appears to be no mandate or authorization to perform the acts alleged in the complaint in this case. The Massachusetts legislature has not mandated that the Board prohibit optometrists from truthfully advertising discounts from their usual prices and fees. In fact, the state legislature has specifically directed to the contrary in Mass. Gen. Laws Ann. ch. 112, § 61 (F 11):

> Except as otherwise provided in this chapter, no such board [of registration] shall make any rule or regulation prohibiting the advertising or dissemination of truthful information concerning the price, nature and availability of goods and services to consumers the effect of which would restrain trade or lessen competition.[30]

This mandate by the legislature is similar to the facts in *Goldfarb* where the Bar promulgated an ethical opinion containing a minimum fee schedule that violated the ethical code provision adopted by the Virginia Supreme Court, which "explicitly directed lawyers not 'to be controlled' by fee schedules." *Goldfarb v. Virginia State Bar*, 421 U.S. at 789. The Court denied state immunity for the state agency's unauthorized restraint of trade.

The Commonwealth of Massachusetts has not articulated a policy prohibiting truthful advertising but has stated a policy favoring truthful advertising by professions regulated by state boards of registration. Furthermore, since no evidence was adduced on the issue, respondent also has failed to meet the second test of *Midcal*, that its conduct is actively supervised by [47] the state.[31] Respondent therefore does not qualify for state action immunity.

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[29] A state agency must meet the *Midcal* test to gain *Parker* immunity. *Hoover v. Ronwin*, 466 U.S. at 568–69; *Deak-Perera Hawaii, Inc. v. Dept. of Transportation, State of Hawaii*, 553 F.Supp. 976, 981, 985–89 (D. Hawaii 1983), *aff'd*, 745 F.2d 1281 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 1756 (1985); *Gambrel v. Ky. Board of Dentistry*, 689 F.2d 612, 618–20 (6th Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983); *Benson v. Arizona State Board of Dental Examiners*, 673 F.2d 272, 275 (9th Cir. 1982); *United States v. Texas State Board of Public Accountancy*, 464 F.Supp. 400 (W.D. Texas 1978), *aff'd per curiam*, 592 F.2d 919 (5th Cir.), *rehearing denied*, 595 F.2d 1221, *cert. denied*, 444 U.S. 925 (1979).

[30] The only restrictions on advertising "otherwise provided" by Massachusetts law are prohibitions on deceptive or misleading advertising and on claims that eyes are examined free. Mass. Gen. Laws Ann. ch. 112, § 73A. (CX 18P-Q).

E. Not a Person Defense

Respondent argues that because it is a state agency it is not a "person" within the meaning of Section 5 of the Federal Trade Commission Act. The case law, however, shows to the contrary.

State and county hospitals are persons within the meaning of the Robinson-Patman Act. *Jefferson County Pharm. Assn. v. Abbott Labs.*, 460 U.S. 150, 155–56 (1983). As agents of the state, local governments have been held to be persons within the meaning of the Sherman Act and the Clayton Act as amended by the Robinson-Patman Act. *City of Lafayette*, 435 U.S. at 394–97.[32] Terms in Federal Trade Commission Act, the Sherman Act, and Clayton Act should be construed together. *United States v. American Building Maintenance Industries*, 422 U.S. 271, 277–78 (1975).[33]

Furthermore, the Commission has expressed the opinion that a state is a "person" within the meaning of Section 5(b) of the Federal Trade Commission Act. *Indiana Federation of Dentists*, 93 FTC 321, n. 1 (1979) (interlocutory order). And a state board [48] has been held to be such a person. *Rhode Island Board of Accountancy*, FTC Docket No. 9181, Order of February 12, 1985 (M. Brown, A.L.J.).

Respondent is, therefore, a person within the meaning of the Federal Trade Commission Act.

F. Mootness

The Commission complaint, issued in July 1985, cited four kinds of advertising that were banned by the Board. On November 7, 1985, the Board repealed three: the bans on sensational and flamboyant advertising, and testimonials, and the advertisement of discounts. (F 112). The revision added two more, banning advertising that offers gratuitous services,[34] and requiring that optometrists offering discounts must substantiate their usual and customary fees. (F 113–14). The fourth regulation cited in the complaint, prohibiting optometrists from allowing a retail optical establishment to advertise their names or the availability of their services, was essentially unchanged. (F 111).

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[31] In *Town of Hallie v. City of Eau Claire*, 105 S.Ct. 1713 (1985), the Court held that a municipality may qualify for state action immunity without showing active state supervision because municipalities are an arm of the state and may be presumed to act in the public interest, whereas private parties must show active state supervision because they may be presumed to act primary in their own interest. When the actor is a state agency the Court indicated—but did not decide—that "it is likely" that state supervision would also not be required. *Id.* at 1720, n. 10. Where the state agency is composed of industry members regulating the industry, however, there apparently must be proof of active supervision by the state for the state action doctrine to apply. *See Hoover v. Ronwin*, 466 U.S. at 569, where the degree to which the state supreme court supervised the committee on bar examinations, a state agency, was relevant to the state action analysis.

[32] The Court relied on the presumption against implied exclusions from coverage to the antitrust laws. *Id.* at 398.

[33] A transgression of the Sherman Act or the Clayton Act violates the Federal Trade Commission Act. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966); *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 609 (1953).

[34] Section 5.11(1)(b) now prohibits "[a]dvertising which offers gratuitous services, in violation of Mass. Gen. Laws Ann. ch. 112, § 73A." (F 113). The statute provision cited in this regulation only bans offers of free eye examinations in connection with advertisements for eyeglasses and contact lenses. Another regulation, § 5.11(1)(c), bans advertising that violates § 73A. (F 113). Section 5.11(1)(b) therefore may mean that any advertising of gratuitous services is a violation of Section 73A. In the past the Board has used Section 73A to suppress advertisement of free goods

(footnote cont'd)

The Board published on June 27, 1985, the proposal to eliminate some of its regulations that ban truthful advertising. (F 105). This action occurred eleven days before the complaint was issued in this case, and months after the Board learned that it might be sued by the FTC. (F 104, 106). By reasonable inference, **[49]** the proposal was caused, at least in part, by the Board's awareness of the Commission's investigation.[35]

The Board enforced its regulations against discount advertising until June 1985, just prior to issuance of the complaint. (F 123–32, 183). The respondent has restrained truthful advertising well after it should have known that its conduct was illegal. (F 187).

The Board has never disavowed its position that advertisements offering discounts are inherently deceptive. (F 180).[36] Optometrists have been confused about what the Board's regulations meant and what sort of advertising would be permitted. (F 184). The Board has no advisory opinions that provide guidance to optometrists. (F 20).

Respondent argues that there is no reasonable expectation that the wrong will be repeated and the case has become moot. This was discussed in *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953):

> [V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot. . . . A controversy may remain to be settled in such circumstances, . . . *e.g.*, a dispute over the legality of the challenged practices. . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . . For to say that the case has become moot means that the defendant is entitled to a dismissal **[50]** as a matter of right. . . . The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

Since a violation has been proved, the burden of showing mootness is on respondent, while complaint counsel have the burden of showing

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or non-examination services. (F. 149–50). The Board adopted a regulation in October 1984 that banned advertising discounts as to both goods and services, whereas its prior regulation had only addressed discounted prices for services. (F 102). Consequently, the new regulation may prohibit the advertising of free services beyond that prohibited by statute, including free follow-up care or eyeglass adjustments.

[35] There is nothing in the record to show that the June 27, 1965 proposal was not based on the Commission's investigation. Respondent's proposed finding No. 64 incorrectly cites Dr. Rapoport's testimony to that effect. He was testifying about why the Board tabled its investigation of one case of discount advertising—not why the Board proposed to change its regulations in June 1985, including the proposed deletion of its rule banning discount advertising. (TR 540–41).

[36] Mootness requires such an announcement. *American Medical Ass'n v. FTC*, 638 F.2d 433, 451 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

that there exists a cognizable chance of recurrent violation necessitating injunctive relief. *SCM Corp. v. FTC*, 565 F.2d 807, 812, 813 (2d Cir. 1977), 612 F.2d 707, *cert. denied*, 449 U.S. 821 (1980). The violation here was egregious. The Board's intent was to prevent optometrists from offering reduced fees to certain consumer groups. The Board continued the unlawful practice for years after it had knowledge that the rules and conduct were illegal and probably unconstitutional. The Board partially discontinued the regulations only after being apprised of the FTC investigation. This evidence shows a "cognizable danger" of repetition by the Board. *TRW, Inc. v. FTC*, 647 F.2d 942, 953–54 (9th Cir. 1981).

IV. REMEDY

The type of order that is necessary to cope with the unfair practices found should be clear and precise. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). All roads to the prohibited goal should be closed so that the order may not be by-passed with impunity. *FTC v. National Lead Co.*, 352 U.S. 429, 431 (1957). The order here is designed to prevent a recurrence of the illegal conduct by prohibiting the Board from imposing restraints on truthful advertising, while permitting the Board to carry out its legitimate functions, prohibiting false or deceptive advertising and enforcing statutory restrictions on advertising.[37]

The evidence shows that the Board prohibited the advertising of discounts. (F 83, 102). The Board enforced its prohibition at "informal conferences" at which offending optometrists were warned to cease such conduct, (F 121–22, 124–25, 132). The Board also instructed optometrists and an advertising agency that advertising discounts for optometric services was illegal, unprofessional, or otherwise improper. (F 118–20, 123, 125–30). Paragraph II A prohibits acts by the Board to prevent the advertising of discounts. Paragraph II A also prohibits the [51] Board from restricting the offering of discounts.[38] It does not prevent the Board from prohibiting false advertising of discounts.[39]

The Board is prohibited by paragraph II B from restraints on "affiliation advertising." The Board has adopted regulations prohibiting such advertising (F 82, 101, 111), has enforced the prohibition, and has declared affiliation advertising to be improper or illegal (F 134–46, 151–54, 157).

Paragraph II C involves testimonials in advertising, and advertising that the Board believes is sensational or flamboyant. From October 1984 to November 1985, the Board had rules prohibiting such advertising. (F 103).

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[37] *American Medical Ass'n*, 94 FTC at 1040, *modified*, 99 FTC 440, *modified*, 100 FTC 572 (1982).

[38] The Board's intent has been to prohibit the offering of discounts. (F 83).

[39] The order does not challenge the Board's application of 246 C.M.R. § 5.11(6), which requires substantiation of "usual and customary fees" when offering discount fees. Substantiation appears appropriate to assure that advertised discounts are not false or deceptive.

Paragraph II D of the order prohibits the Board from using any other person or organization to take action prohibited by the order.

Part III of the order provides for petitioning of the legislature for statutory changes affecting matters covered by the order.

Part IV of the order imposes affirmative obligations on the Board. The Commission's authority to issue orders requiring a respondent to make affirmative disclosures, including sending notices to affected parties, is well-established.[40]

Paragraph IV A of the order requires the Board to notify optometrists in Massachusetts of the entry of an order against the Board by mailing a copy of the final order, and an announcement summarizing the order, to all optometrists currently licensed in Massachusetts, to all current applicants for a license in Massachusetts and applicants during a period of five **[52]** years after entry of a final order, and to the Massachusetts Optometric Association.

The Board has been enforcing its prohibitions of truthful advertising in Massachusetts for several years, and has informed optometrists that such advertising is illegal and improper. (F 187). The notice is designed to inform optometrists in Massachusetts of the order. The order allows the Board one year to include the notice and order in its regular mailings for annual license renewal, thus avoiding the cost and burden of a separate mailing. The order gives the Board sixty days to send a single notice to the state optometric association and subsequent applicants.

Complaint counsel proposed an order requiring the Board to repeal 246 C.M.R. § 5.07(3), which prohibits optometrists from permitting or participating in affiliation advertising by non-optometrists. This case was not tried on the theory that the rule is preempted by Section 5 of the FTC Act. *See Fisher*, 106 S.Ct. at 1048. That theory requires a different, higher standard of proof. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659–61 (1982). The rule, therefore, should not be abrogated. *United States v. Texas State Board of Public Accountancy*, 592 F.2d 919 (5th Cir.), *cert. denied*, 444 U.S. 925 (1979).

Paragraphs IV B-C are reporting and recordkeeping provisions to assure compliance with the order.

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[40] *American Medical Ass'n*, 94 FTC at 1039–40; *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1439 (9th Cir. 1986); *Amrep Corp. v. FTC*, 768 F.2d 1171, 1180 (10th Cir. 1985), *cert. denied*, 106 S.Ct. 1167 (1986); *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 756–62 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978); *Heater v. FTC*, 503 F.2d 321, 323 n. 7 (9th Cir. 1974).

ORDER

I.

For the purpose of this order, the following definitions shall apply:

A. "*Board*" shall mean the Massachusetts Board of Registration in Optometry, its officers, members, committees, representatives, agents, employees, and successors.

B. "*Discounted price*" shall mean a price that is less than the price the person or organization usually charges for the good or service.

C. "*Disciplinary action*" shall mean:

1. the revocation or suspension of, or refusal to grant, a license to practice optometry in **[53]** Massachusetts, or the imposition of a reprimand, fine, probation, or other penalty or condition; or
2. the initiation of an administrative, criminal, or civil proceeding.

D. "*Optical good*" shall mean any commodity for the aid or correction of visual or ocular anomalies of the human eyes, such as lenses, contact lenses, spectacles, eyeglasses, eyeglass frames, and appliances.

E. "*Optometric service*" shall mean any service that a person duly registered and licensed to practice optometry under Mass. Gen. Laws Ann. ch. 112, §§ 66 *et seq.* is authorized to provide pursuant to those statutory provisions.

F. "*Price advertising*" shall mean advertising the price of any optometric service or optical good.

II.

It is ordered, That the Board, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall cease and desist from, directly or indirectly, or through any rule, regulation, policy, disciplinary action or other conduct:

A. Prohibiting, restricting, impeding, or discouraging any person or organization from advertising or offering a discounted price for optometric service or optical goods;

B. Prohibiting, restricting, impeding, or discouraging the advertising or publishing of the name of an optometrist or the availability of an optometrist's services by a person or organization not licensed to practice optometry;

C. Prohibiting, restricting, impeding, or discouraging any other advertising that uses testimonials or advertising that the Board believes is sensational or flamboyant;

D. Inducing, urging, encouraging, or assisting any optometrist or organization to take any of the actions prohibited by this part.

Nothing in this order shall prevent the Board from adopting and enforcing reasonable rules, or taking disciplinary or other action, to prevent advertising that the Board reasonably believes to be fraudulent, false, deceptive, or misleading within the [**54**] meaning of Massachusetts General Laws, Chapter 112, Sections 71 and 73A, or that the Board reasonably believes to otherwise violate Massachusetts statutes.

III.

It is further ordered, That this order shall not be construed to prevent the Board from engaging in activity protected under the First Amendment to the United States Constitution to petition for legislation concerning the practice of optometry.

IV.

It is further ordered, That the Board shall:

A. Distribute by mail a copy of this order, and executed Appendix:

1. to each person licensed to practice optometry in Massachusetts within one (1) year after the date this order becomes final;

2. within thirty (30) days after this order becomes final, to each person whose application to practice optometry in Massachusetts is pending, and to each person who applies for five (5) years thereafter, within sixty (60) days after the filing of the application; and

3. to the Massachusetts Optometric Association, within sixty (60) days after the date this order becomes final;

B. Within one hundred twenty (120) days after the date that this order becomes final, and annually for a period of five (5) years on or before the anniversary of the date on which this order becomes final, submit a written report to the Federal Trade Commission setting forth in detail the manner in which the Board has complied with this order;

C. For a period of five (5) years after the date that this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and [**55**] copying, all documents and records containing any reference to any matter covered by this order; [**56**]

APPENDIX

The Federal Trade Commission has issued an order against the Massachusetts Board of Registration in Optometry. This order provides that the Board may not prohibit or restrict:

1. offering, or truthful advertising that offers, discounted fees for goods and services provided by optometrists;
2. truthful advertising of an optometrist's name and the availability of his or her services by retail sellers of optical goods or other persons not licensed to practice optometry;
3. advertising that uses testimonials or that the Board believes is sensational or flamboyant.

The order does not affect the Board's authority to prohibit advertising that is fraudulent, false, deceptive, or misleading, or advertising that otherwise violates Massachusetts statutes.

In conformity with the Federal Trade Commission's order, you are advised that the prohibition on advertising gratuitous services contained in 246 C.M.R. § 5.11(1)(b) does not prohibit all advertising of gratuitous services. It only applies to those advertisements of gratuitous services prohibited by Massachusetts law, specifically Mass Gen. Laws Ann. ch. 112, § 73A. This statute prohibits "in any newspaper, radio, display sign or other advertisements . . . any statement containing the words 'free examination of eyes,' 'free advice,' 'free consultation,' 'consultation without obligation,' or any other words or phrases of similar import which convey the impression that eyes are examined free." The Board's rule is no broader than that statutory prohibition.

Pursuant to 246 C.M.R. § 5.11(6), the Board may require reasonable substantiation of a licensee's usual fees for services or goods, for the purpose of preventing the false, deceptive, or misleading advertisement of discounted fees by a licensee.

For more specific information, you should refer to the order itself, a copy of which is enclosed.

Chairman
Massachusetts Board of Registration
in Optometry

OPINION OF THE COMMISSION

By CALVANI, *Commissioner*:

I. INTRODUCTION

A. Background

Respondent Massachusetts Board of Registration in Optometry is charged with engaging in practices constituting (1) unfair methods of competition and (2) unfair or deceptive acts or practices that violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The complaint alleges that respondent has restrained competition among optometrists in the Commonwealth of Massachusetts by unreasonably restricting truthful advertising.

Respondent is a state agency that regulates the practice of optometry in Massachusetts. IDF 1–13.[1] But the Massachusetts Legislature has vested respondent with only limited authority to regulate advertising. Section 61 of Mass. Gen. Laws Ann., ch. 112, provides that: [2]

> Except as otherwise provided in this chapter, no such board shall make any rule or regulation prohibiting the advertising or dissemination of truthful information concerning the price, nature and availability of goods and services to consumers, the effect of which would be to restrain trade or lessen competition.

(Emphasis added). In promulgating this law, the Massachusetts Legislature declared that:

> any ordinance, rule or regulation promulgated by an agency of the commonwealth or political subdivision thereof which prohibits or limits competitive advertising relating to the price of consumer goods or services shall be void as against public policy.[2]

These statutes apply to the regulations promulgated by the respondent.

Notwithstanding the determination by the Massachusetts Legislature limiting respondent's authority to issue regulations restricting truthful competitive advertising, on two occasions respondent promulgated regulations that are the subject of the [3] challenge in this action. The first set of challenged regulations became effective on July 1, 1979, and included the following restrictions: (a) Section 3.08 of respondent's regulations prohibited any optometrist from allowing "the use of his name or professional ability by an optical establishment for the financial gain of such establishment;"[3] and (b) Section

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[1] The following abbreviations are used in this opinion:

ID – Initial Decision of the Administrative Law Judge
IDF – Numbered Finding of the Administrative Law Judge
CX – Complaint Counsel's Exhibit
RB – Respondent's Post-Trial Brief
RAB – Respondent's Appeal Brief

[2] Mass. Gen. Laws Ann., ch. 112, §61 (emphasis added). IDF 11. The only limitation on truthful advertisements proscribed by chapter 112 is contained in §73A, which provides:

> Persons may advertise the sale price of eyeglasses, contact lenses or eyeglass frames provided they shall not include in any . . . advertisement any statement which in any way misrepresents any material or service or credit terms, or, any statement containing the words "free examination of eyes", "free advice", "free consultation", "consultation without obligation", or any other words or phrases of similar import which convey the impression that eyes are examined free. Any advertisement offering contact lenses, eyeglasses, or eyeglass frames at a fixed price shall include a statement which indicates that said price does not include eye examination and professional services. Such statement shall indicate whether said price includes lens and, if so, the type of lens, single vision, bi-focal or tri-focal and the strength thereof, low, medium or high.

[3] Respondent claims that this regulation was promulgated in accordance with Sections 72 and 73B of Mass. Gen. Laws Ann., Ch. 112. RAB at 46–48. Section 72 requires an optometrist to practice under his or her own name. Section 73B states:

> No person shall practice optometry on premises not separate from premises whereon eyeglasses, lenses, or eyeglass frames are sold by any other person; nor shall any person practice optometry under any lease, contract or other arrangement whereby any person, not duly authorized to practice optometry, shares, directly, or indirectly, in any fees received in connection with said practice of optometry. For the purposes of this section, any room, suite of rooms or area in which optometry is practiced shall be considered separate premises

(footnote cont'd)

3.12 prohibited any optometrist from "discriminating directly or indirectly in his professional services." Respondent interpreted Section 3.12 to prohibit offering or advertising discounts by optometrists. CX 29 at 4, 6; CX 261 at 10–11.

Consistent with the state policy precluding prohibition of truthful advertising, the Massachusetts Executive Office of Consumer Affairs and the Massachusetts Department of the State Auditor criticized respondent for issuing the anticompetitive [4] restraints. IDF 84–99.[4] Respondent thereafter revised its regulations and on October 18, 1984, promulgated the second set of regulations challenged by the complaint in this matter. IDF 100–103. In the regulations, respondent retained its restriction on affiliation advertising;[5] replaced Section 3.12 of its regulations with an explicit restriction on discount advertising;[6] and added two other explicit restrictions on advertising. Section 5.11(d) declared "advertising which uses testimonials" to be contrary to the public interest. Section 5.11(1)(a) prohibited advertising that appeared to be "sensational" or "flamboyant."[7] In sum, not only did respondent [5] fail to follow the advice of the two state agencies, it acted to impose even more anti-competitive restraints.

After a three-week trial, Administrative Law Judge James P. Timony, in an initial decision filed June 23, 1986, found that respondent has attempted to slow the growth of "commercial" optometric practice through its restraints on truthful advertising, and that the result has been higher prices for eye care in Massachusetts. ID 30–31. He found that respondent's actions were controlled by practicing optometrists who stood to benefit financially from the restraints on competi-

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if it has a separate and direct entrance from a street, public corridor or area available to the public, whether or not it has an entrance from any other room or area in the same building.

[4] To the extent not inconsistent with the Findings in this opinion, the Commission adopts all of the Findings of Facts by Administrative Law Judge James P. Timony in his Initial Decision filed June 23, 1986.

[5] Section 5.07(3) of its 1984 regulation states:

> An optometrist shall not permit or authorize the use of his name or professional ability and services by an optical establishment or business. An optometrist shall not permit or authorize establishment or [sic] authorize an optical establishment or business to advertise, publicize or imply the availability of his optometric services, (either on or off the premises).

IDF 101.

[6] Section 5.11(1)(f) of respondent's 1984 regulations declares advertising which offers gratuitous services, rebates, discounts, refunds, or otherwise, with the purpose of increasing the number of private patients to be contrary to the public interest. Section 5.11(1)(f) expanded respondent's ban on discount advertising, which under Section 3.12 had been limited to optometric services, to include optical goods. IDF 102.

[7] The Commission's investigation came to the attention of respondent in February 1985. IDF 104. On June 27, 1985, respondent published a notice of proposed changes in its regulations in the Massachusetts Register. IDF 105. On November 7, 1985, subsequent to the filing of the complaint in this matter, respondent promulgated revised regulations. IDF 106, 110–115. Section 507(3) of the 1985 regulations continued to prohibit affiliation advertising by prohibiting optometrists from permitting or authorizing the use of his name, professional ability or services by any person or establishment not duly authorized to practice optometry. In addition, respondent imposed a requirement that "[u]nauthorized advertising or publicizing of a license's availability to perform eye-examinations or other professional services shall be immediately reported to the Board by the licensee". The November 1985 amendments also deleted Sections 5.11(1)(a) and 5.11(1)(f). While the absolute bans on sensational, flamboyant, or discount advertisements were deleted, respondent added a new regulation, Section 5.11(6), which required usual and customary fees to be substantiated when optometrists offer discount fees for services or materials.

tion and ruled that respondent's conduct constituted a "combination or conspiracy." ID 31–34. He further ruled that respondent's ban on discount advertising was *per se* unlawful, ID 37–39, and that all of the restraints were unlawful under the rule of reason, finding no valid justification for respondent's suppression of [6] broad categories of truthful information about prices and services offered by optometrists. ID 39–42.

Judge Timony rejected respondent's state action defense and held that respondent's actions constituted unfair methods of competition and unfair acts or practices in violation of Section 5. ID 42–47. He also rejected respondent's contention that part of the case was moot, and held that the evidence established a cognizable danger of a recurrent violation warranting prospective relief. ID 48–50.

Judge Timony issued an order that prohibits respondent from restricting the advertising or offering of discounted prices, advertising of affiliations between optometrists and optical retailers, use of testimonials in advertising, and advertising that respondent considers "flamboyant" or "sensational". ID 51–52. The order permits respondent to regulate false or deceptive advertising and to enforce statutory restraints on advertising. The order also requires respondent to notify optometrists in Massachusetts of the cease-and-desist order.

B. Questions Raised By Appeals

This matter is before the Commission on cross-appeals from Judge Timony's initial decision. Respondent raises seven issues for review. First, respondent argues that Judge Timony incorrectly ruled that respondent was not entitled to state action immunity. Second, respondent argues that the Commission [7] is precluded from finding that respondent has violated the Federal Trade Commission Act absent a showing that the antitrust laws preempt those actions. Third, respondent assigns error to Judge Timony's ruling that the regulations and enforcement actions of respondent constituted a "combination or conspiracy" proscribed by the FTC Act. Fourth, respondent argues that Judge Timony applied the incorrect legal standard in holding that the regulations constitute unfair methods of competition. Fifth, respondent argues that Judge Timony's holding that the challenged acts or practices are unfair in violation of Section 5 is in error. Sixth, respondent assigns error to Judge Timony's conclusion that the repeal of three of the challenged regulations does not render the claims for relief moot. Finally, respondent claims that Judge Timony's order that respondent notify Massachusetts optometrists of the cease-and-desist order is outside of the scope of the Commission's authority.

Complaint counsel appeal Judge Timony's decision not to require repeal of respondent's regulation banning affiliation advertising. In addition, complaint counsel request that the Commission broaden the order to prohibit restraints on all forms of price advertising and make other modifications and clarifications of Judge Timony's order to ensure effective relief. We now take up these issues although in a different order. **[8]**

II. LEGAL ANALYSIS

A. Restraint of Trade

1. The Law of Horizontal Restraints

The Supreme Court's recent decisions in *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) [hereinafter "*NCAA*"], and *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979) [hereinafter "*BMI*"], are important developments in the law on horizontal restraints and merit attention. In *BMI*, the Court remanded for rule of reason analysis an agreement among a group of composers to issue a blanket license to CBS to perform the composers' songs. The Court concluded that a pricing arrangement that is essential to a legitimate purpose is not within the *per se* rule. In doing so the Court observed that the arrangement at bar was necessary to the production of the compositions and therefore served a legitimate purpose in the marketplace. The Court rejected a simplistic and literalistic test whether competitors "fixed" a "price," but rather inquired whether "this particular practice is . . . 'plainly anticompetitive' and very likely without 'redeeming virtue.' " *BMI*, 441 U.S. at 9. It elaborated on how to identify such practices, instructing courts to ascertain "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead **[9]** one designed to 'increase economic efficiency and render markets more, rather than less, competitive.' " *Id.* at 19-20.

Five years later, in *NCAA*, the Court refused to apply the *per se* rule to allegations that the NCAA had fixed prices for telecasts of collegiate football games and that the exclusive network contracts were tantamount to a group boycott of all other broadcasters. Although the Court recognized that the exclusive contracts restricted pricing and output, it again declined to invoke the *per se* rule. In order to consider the restraint, the Court considered the defendants' claimed justifications. However, once the Court was convinced that the NCAA's asserted justifications did not withstand scrutiny, it condemned the practice as an unreasonable restraint of trade.[8]

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[8] In *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), the Court again applied the *NCAA* analysis. It reversed a Court of Appeals decision vacating a Commission decision that a conspiracy among dentists to refuse

(footnote cont'd)

Several points flow from the Court's pronouncements. First, the Court expressly stated that there is often no bright line that separates *per se* from rule of reason analysis, thus [10] destroying the neat taxonomy that characterized many an antitrust course outline. Second, the Court went on to say that the essential inquiry under both is the same, *i.e.*, "whether or not the challenged restraint enhances competition."[9] Thus the Court has explicitly recognized the breakdown of the tidy rules that at least superficially characterized much of the traditional wisdom. One important—perhaps the most important—result of the cases is that the utility of the conventional labelling exercise has been called into question.[10] Indeed, as one commentator has observed, litigants and courts have taken positions that distort *both* ends of this dichotomy—saying that conduct must be condemned automatically, without regard for any redeeming competitive virtues, if it can be categorized as falling into a *per se* category; while conduct falling into the residual rule of reason category cannot be condemned at all until all aspects of definition, market power, intent, and net competitive effect have [11] been analyzed—a process that many consider to be the antitrust equivalent to Chinese water torture.[11]

A structure for evaluating horizontal restraints emerges from the Court's recent decisions. Although the Court has not explicitly adopted this structure for analyzing horizontal restraints, the basic principles of the analysis are set forth in the *NCAA* and *BMI* opinions. The

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to submit x rays to dental insurers for use in benefits determinations constituted an unfair method of competition. In so doing, the Court observed that no elaborate analysis was required to see the anticompetitive nature of the dentists' agreement, "[a]bsent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services. . . ." *Id.* at 459. The Court rejected the dentists' argument that the Commission erred in not making elaborate market power determinations, stating "the Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason." *Id.* at 460. The Court found that the boycott of insurers increased the cost of dental care and rejected the quality of care arguments with equal alacrity.

[9] *NCAA*, 468 U.S. at 104.

[10] A good example of the conventional wisdom antedating *NCAA* is the Seventh Circuit's 1982 decision in *Marrese v. American Academy of Orthopaedic Surgeons*, 692 F.2d 1083, 1093 (7th Cir.), *vacated on other grounds*, 1982–83 Trade Case Cas. (CCH) ¶65,214 (7th Cir. 1983), *on rehearing*, 726 F.2d 1150 (7th Cir. 1984), *rev'd*, 470 U.S. 373 (1985) ("The great watershed of . . . [antitrust] law is the distinction between per se illegality and illegal under the Rule of Reason.").

[11] *See* T. Muris, *The Bureau of Competition's Approach To Applying The Rule of Reason* (unpublished manuscript).

Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973), is an excellent example of the former method of analysis. There a professional golfer was alleged to have improved the lie of her ball during a LPGA tournament in violation of the rules of golf. After a complaint, observers were appointed to watch the golfer and they allegedly reported illegal ball movement. The golfer was suspended from play by the LPGA. An antitrust suit for treble damages ensued alleging that the suspension amounted to an illegal group boycott. The plaintiff moved for summary judgment asking the court to characterize defendants' conduct as *per se* in nature and to reject the defendants' explanations of the reasonableness of their suspension of plaintiff. The court agreed: A group boycott of this variety is a *per se* violation of the law. Whether the plaintiff had cheated in professional tournament play, and whether suspension of plaintiff occurred because she had cheated in professional tournament play, were irrelevant and would not be considered by the court. The magic of the label. Hornbook consulted: Group boycotts found to be *per se* illegal. The result automatically follows, like night follows day.

method of analysis we employ here is more useful than the traditional use of the *per se* or rule of reason labels but also is consistent with the recent cases that apply a traditional analysis. Under this analysis, the horizontal restraints in question could be condemned, without further factual development, as inherently suspect restraints for **[12]** which no justifications seem sufficiently plausible to warrant factual inquiry.[12]

This structure is readily described as a series of questions to be answered in turn. First, we ask whether the restraint is "inherently suspect." In other words, is the practice the kind that appears likely, absent an efficiency justification, to "restrict competition and decrease output"? For example, horizontal price-fixing and market division are inherently suspect because they are likely to raise price by reducing output. If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a *second* question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition (*e.g.*, by reducing the costs of producing or marketing the product, creating a new product, or improving the operation of the market)? Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry—a **[13]** *third inquiry*—is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry—there are no likely benefits to offset the threat to competition. It is noteworthy that the Supreme Court in *NCAA* found a plausible efficiency, considered it, found it wanting, and rendered a decision for the plaintiffs under the rule of reason without employing the full balancing test normally associated with the rule.

We now proceed to apply this structure to the case at bar.

2. Advertising As Competition

Advertising plays an "indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Board of Arizona*, 433 U.S. 350, 364 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *American*

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[12] We recognize that the Court's opinions have at times continued to apply traditional antitrust analysis. *E.g.*, *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 351 (1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980). Adoption of our approach would not lead to a different result in cases such as *Catalano* or *Maricopa*, which involved horizontal agreements to fix the terms of credit and horizontal agreements to establish maximum prices for medical services.

Medical Association, 94 FTC 701, 1005 (1979), *aff'd,* 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court,* 445 U.S. 676 (1982). Restraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects. "[T]he nature or character of these restrictions is sufficient alone to establish their anticompetitive quality." *American Medical Association,* 94 [14] FTC at 1005. In the same vein, so too are respondent's restraints. Respondent has imposed total bans on general categories of advertising. As the Commission stated in discussing the order it issued in the *American Medical Association* case, "[a]cross-the-board bans on entire categories of representations or general restrictions applicable to any representation made through a specific medium are highly suspect." 94 FTC at 1030.

While this case in large part parallels *American Medical Association,* it presents an important additional factor. The advertising restraints here have the force of law. Optometrists who violate respondent's commands may lose their professional license, and thereby their livelihood. Respondent's restraint on discount price advertising is especially pernicious. By informing the public, price advertising places pressure on sellers to reduce prices, and instills cost consciousness in providers of services. *American Medical Association,* 94 FTC at 1005, 1011.

Banning advertisements of discounts impedes entry by new optometrists that depend on attracting a high volume of patients. IDF 68–69. Discounts also attract patients during times of low demand. IDF 61, 68. A prohibition on discount advertisements obstructs such efforts to promote efficient use of resources. By preventing optometrists from informing consumers that discounts are available, respondent eliminates a form of price competition. IDF 72, 77, 80. *American Medical Association,* 94 FTC at 1005. [15] Advertising of discounts benefits both buyers and sellers and improves the functioning of the market. IDF 60–62, 65. Consumers respond to discount advertising, enabling the optometrist to maintain a larger inventory of lenses and to employ economies of scale, keeping prices low while offering consumers greater choice. IDF 68–70.

Massachusetts statutes and regulations permit optometrists to affiliate with a retail optical store, so long as certain conditions are met. The optometrist must, for example, practice on "separate premises" from the optician, which may include an office next door with a separate public entrance. Mass. Gen. Laws Ann. ch. 112, §73B. CX 18–R. Respondent, however, tried to prevent retail optical stores from informing the public of these lawful affiliations and of the availability of the optometrist's services. IDF 82, 101, 111, 134–46.

A ban on truthful advertising of an affiliation between an optometrist and a retail optical store makes entry by retail optical chains more difficult. IDF 79. Many consumers prefer the convenience of "one-stop shopping" available when retail optical chains affiliate with optometrists. IDF 74, 76. Large optical establishments achieve economies of scale that enable them to offer lower prices. IDF 60. They compete successfully by advertising availability of the optometrist. IDF 76. Respondent's ban on affiliation advertising has posed a barrier to entry by optical establishments into Massachusetts. IDF 79. **[16]** Prices are lower in states where affiliation advertising is permitted. IDF 78.

Respondent's ban on the use of testimonials and sensational or flamboyant advertising is also anticompetitive and injures consumers. IDF 103. Testimonials may convey useful information. Like the use of illustrations, these advertising methods attract the attention of the audience to the advertising message. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626, 647 (1985).

3. Application of Law

a. *Price Advertising*

If a restraint is inherently suspect, that is, it usually restricts output, and has no redeeming virtue, it is unlawful. *BMI,* 441 U.S. at 19–20. The likelihood that horizontal price restrictions restrain output is generally sufficient to dispense with an inquiry into the special characteristics of a particular industry. *NCAA,* 468 U.S. at 546, n.21. Agreements among competitors to limit discounts have been deemed illegal. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648–50 (1980). While the Supreme Court has been reluctant to condemn rules adopted by professional associations as presumptively **[17]** unreasonable,[13] rules plainly affecting price have been so treated. *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 348–49 (1982); *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 782 (1975). Restrictions on price advertising are unlawful because they are aimed at "affecting the market price." *United States v. Gasoline Retailers Association,* 285 F.2d 688, 691 (7th Cir. 1961). A restraint on price competition imposed by a state board like respondent has been held to be unlawful. *United States v. Texas State Board of Public Accountancy,* 464 F. Supp. 400, 402–03 (W.D. Tex. 1978), *aff'd* as modified, 592 F.2d 919 (5th Cir. 1979), *cert. denied,* 444 U.S. 925 (1979).[14] Respondent has prohibited the advertising of discounts on optical goods or services by optometrists, IDF 83, 102, and has enforced this ban. IDF 117-133. The restraint is inherently suspect and presents no plausible efficiency justification. Accordingly, it must be summarily condemned. [18]

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[13] *FTC v. Indiana Federation of Dentists,* 476 U.S. 447 (1986).

[14] Respondent informed the State Auditor that its ban on discount advertising was intended to prevent optometrists from charging certain persons higher than usual fees. A horizontal agreement to fix maximum prices is *per se* unlawful. *Maricopa,* 457 U.S. at 348. Moreover, the State Auditor found that: "contrary to this stated intent, however, respondent has invoked the regulation to restrain optometrists from offering reduced fees to certain consumer groups, such as senior citizens and company employees." CX 261 at 10; IDF 83.

b. *Affiliation advertising, testimonials, and sensational or flamboyant advertising*

Similarly, we conclude that respondent's ban on affiliation advertising is facially anticompetitive because it makes entry by retail optical stores more difficult and raises prices for eye care. The fact that this ban deprives consumers of information concerning service rather then price in no way diminishes the inherently anticompetitive nature of the restraints. As the Supreme Court observed in *Indiana Federation of Dentists*, 476 U.S. at 459 (1986), in assessing an agreement withholding information from consumers:

> [a] refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them.

Having determined that respondent's ban on affiliation advertising is facially anticompetitive, we turn now to the two procompetitive justifications proffered by respondent. First, it contends that such advertisements are inherently deceptive. Second, it argues that its ban protects the public from the results of "undue commercial influence." RAB 74, 75-78, 96-97. Neither justification withstands scrutiny. The truthful advertising of a lawful business relationship is not inherently deceptive. Prohibiting truthful statements about a lawful affiliation relationship cannot be justified on the ground that some advertisers may seek to deceive the public. *American* [19] *Medical Association*, 94 FTC at 1009-10; *Bates*, 433 U.S. at 372-75. Neither justification is legally plausible. We therefore reject respondent's "inherent deception" justification.

Respondent's true motivation for its ban on affiliation advertising is revealed by the "undue influence" justification it argued before Judge Timony. Respondent argued that its ban was necessary because such affiliation advertising is the "glue that holds the affiliation . . . together," RB at 91, and that a ban would "exert a moderating influence on the unbridled growth of aggressively competing commercial optometrists." RB at 124. Respondent is apparently attempting to override the legislative judgment that affiliation relationships should be permitted. Moreover, respondent's concerns about undue influence were rejected as groundless by the State Auditor. IDF 94-98. Respondent's undue influence justification is merely a euphemistic way of stating that competition is inappropriate. We disagree.

We similarly conclude that respondent's prohibitions on advertising that uses testimonials or is sensational or flamboyant are anticompetitive on their face because they prohibit techniques that can make the provision of information about optometristic services more effective. Respondent makes no attempt to justify these restraints. Indeed, total bans on testimonials or "undignified" advertising cannot be justified. *American Medical Association*, 94 FTC at 1023–24. Further, the Supreme Court has clearly held that flat bans on "undignified" **[20]** means of advertising lack any justification. *Zauderer*, 471 U.S. at 647–48. In the sum, there is no legitimate justification for respondent's restraints on truthful advertising. Respondent's arguments are not cognizable as antitrust defenses because they are premised on the notion that competition itself is inappropriate in optometry. Accordingly, we conclude that respondent's plainly anticompetitive conduct is unlawful.[15] **[21]**

B. The Commission's Jurisdiction

Respondent argued below that it was not a "person" within the meaning of Section 5 of the Federal Trade Commission Act. This argument was rejected by Judge Timony, ID at 47, and not pressed by respondents on their appeal to the Commission. Nonetheless, we address it here.

"Person" is not specifically defined within the Commission's organic statute.[16] While defined in both the Sherman and Clayton Acts,[17] state boards are not specifically included in the definitions. Nonetheless, local governments, as agents of the state, have been held to be persons within the meaning of the Sherman Act and the Clayton Act. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 394–97 (1978). There the Court relied on the presumption against implied exclusions from **[22]** coverage to the antitrust laws. *Id.* at 398. State and county entities are persons within the meaning of the Robinson-Patman Act, 15 U.S.C. §2(a) (1982). *Jefferson County Pharmaceutical Association v. Abbott Laboratories*, 460 U.S. 150, 155–56 (1983). Terms in the Federal Trade Commission Act, the Sherman Act, and Clayton Act should be construed together. *United States v. American Building Maintenance Industries*, 422 U.S. 271, 277–78 (1975). Accordingly, we hold that respondent is a "person" for purposes of jurisdiction under the Federal Trade Commission Act.

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[15] On December 15, 1986, after the close of the record and oral argument in this matter, respondent filed a motion to supplement the record in this proceeding to include the Staff Report and Presiding Officer's Report from the Commission's Eyeglasses II rulemaking proceeding. Complaint counsel, on December 22, 1986, filed a timely reply opposing respondent's motion. Respondent argues that the reports' discussion of the optometry industry, including a survey of the 50 state laws that regulate optometric practice, is relevant to its defense that the regulations and enforcement actions which are the subject of the complaint are reasonable exercises to its police power. Further, according to respondent, both proffered exhibits contain extensive analysis of the "quality of care" justifications, which go to its state action defense. Respondent also claims that the analyses of methodology and validity of the "BE Study" in both proposed exhibits are relevant to the validity and usefulness of the BE Study to this proceeding. Having carefully considered respondent's motion, the Commission concludes that the proffered exhibits constitute inadmissable hearsay. The exception in Federal Rule 803(8)(C) for "factual findings resulting from an investigation made pursuant to an authority granted by law . . . unless the sources of information or other circumstances indicate acts of trustworthiness" does not apply to the reports. Both reports are preliminary in nature and do not represent the official views of the Commission. Thus, neither report constitutes "factual findings" of the agency within the meaning of Federal Rule 803(8)(C). *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1145 (E.D. Pa. 1980), *rev'd in part on other grounds sub nom. In re Japanese Products*, 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Moreover, to the extent that any evidence in the Eyeglasses II rulemaking record is relevant to this proceeding, respondent had ample opportunity to seek to offer, and in fact did offer, such evidence while this case was still in trial. Accordingly, the motion is denied.

[16] The principal reference to the word "person" is contained in Section 5(a)(2) of the FTC Act, which provides that the "Commission is . . . empowered to prevent persons, partnerships, or corporations . . . from using unfair methods of competition . . . and unfair or deceptive acts or practices. . . ." 15 U.S.C. §45(a)(2)(1982). Obviously, the state Board is neither a partnership nor corporation. Thus, if the Board is subject to the Commission's jurisdiction, it must be as a person.

This is consistent with Commission case law. The Commission has held that a state is a "person" within the meaning of Section 5(b) of the Federal Trade Commission Act. *Indiana Federation of Dentists*, 93 F.T.C. 321, n.1 (1979) (interlocutory order);[18] Statement of Basis and Purpose for the Trade Regulation Rule on Advertising of Ophthalmic Goods and Services, 43 Fed. Reg. 23992, 24004 (1979). And a state board has been held to be such a person. *Rhode Island Board of Accountancy*, FTC Docket No. 9181, order of February 12, 1985 (M. Brown, A.L.J.).

Our holding is also supported by the legislative history of the FTC Act, which indicates that Congress intended an expansive meaning for the word "person." Section 5 of the FTC Act gives **[23]** the Commission jurisdiction over "every kind of person, natural or artificial, who may be engaged in interstate commerce."[19]

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[17] The term is defined in both the Sherman and Clayton Acts, 15 U.S.C. §§7, 12 (1982). Both statutes provide:

> "[t]hat the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

[18] Although in that case the Commission held that a state is a "person" for purposes of intervenor status, it would be unusual for Congress to assign the term "person" two different meanings within the same section of the same statute. *See United Stats v. Cooper Corp.*, 312 U.S. 600, 606 (1941) ("It is hardly credible that Congress used the term 'persons' in different senses in the same sentence.").

[19] 51 Cong. Rec. 14,928 (1914). Rep. Covington, the House sponsor of the FTC Act and a manager of the Act in Conference Committee, made the following statement on the House floor regarding the jurisdictional scope of Section 5.

> The section which deals with unfair methods of competition confers upon the Commission certain administrative powers somewhat analogous to the Interstate Commerce Commission, extending to persons, partnerships, and corporations, and with respect to the great industrial activities in interstate commerce. It embraces within the scope of that section every kind of person, natural or artificial, who may be engaged in interstate commerce.

Id. at 14,928.

Rep. Covington's analogy to the Interstate Commerce Commission underscores the Commission's holding. The Elkins Act, 49 U.S.C. §41(1), which was the ICC's version of the Robinson-Patman Act prior to its repeal in 1978, applied to "person, persons, or corporations." In *Union Pacific R. Co. v. United States*, 313 U.S. 450, 463 (1941), the Supreme Court held that a state entity was a "person" within the meaning of the Elkins Act.

Recent amendments to the FTC Act have broadened the Commission's jurisdiction to include acts or practices "in or affecting commerce."

C. The Contract Combination & Conspiracy Requirement

Respondent urges that complaint counsel has not satisifed the duality requirement of Section 1 of the Sherman Act, 15 U.S.C. 1 (1982). RAB at 16. This Section requires that multiple actors agree to a common design. As the Supreme Court has recently observed: "Independent action is not proscribed." **[24]** *Monsanto Co. v. Spray-Rite Service Co.*, 465 U.S. 752, 761 (1984). Or, as Judge Sprecher has recently observed:

> The fundamental prerequisite is unlawful conduct by two or more parties pursuant to an agreement, explicit or implied. Solely unilateral conduct, regardless of its anticompetitive effects, is not prohibited by Section 1. Rather, to establish an unlawful combination or conspiracy, there must be evidence that two or more parties have knowingly participated in a common scheme or design.

Contractor Utility Sales Co. v. Certain-Teed Products Corp., 638 F.2d 1061, 1074 (7th Cir. 1981), *cert. denied*, 470 U.S. 1029 (1985). Respondent urges that respondent is a single entity incapable of conspiring with itself.[20]

We disagree. The Supreme Court and lower courts have recently focused on whether there are separate economic entities in play in determining whether a contract, combination or conspiracy is present. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), the Court found that a parent corporation was incapable of conspiring with its wholly-owned subsidiary, stressing that economic reality and not formalism control in assessing whether "separate economic entities" engaged in a common course of action. 467 U.S. at 769–76. Applying the *Copperweld* analysis, Judge Timony correctly found that respondent members have separate economic identities and thus engage in a **[25]** combination when they act together on the Board. ID at 34. He noted that each optometrist on the Board is principally engaged in the private practice of optometry in the market that respondent regulates. ID at 34. Absent respondent members' agreement that imposed the regulations at issue, the members and all other optometrists in the Commonwealth would be free to compete with each other by individually deciding whether to advertise. ID at 34. It is precisely such combinations to suppress competition that are prohibited by Section 1 of the Sherman Act.

Judge Bork recently reached a similar conclusion in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 880 (1987). There the court found that the directors of Atlas, a nationwide moving company, had conspired among themselves by voting to adopt a policy terminating its contracts with any affiliated carrier in the Atlas network that handled interstate moving business on its own account as well as for Atlas. What took this case "out of the *Copperweld* rule" was the fact that "all but two members of the board represented separate legal entities that competed in interstate commerce." *Id.* at 215. Likewise, the full-time optometrists on the Board are separate legal entities that compete in interstate commerce, and thus are capable of conspiring in restraint of trade. *See also Greenville Publishing Co. v. Daily Reflector*, 496 F.2d 391, 399–400 (4th Cir. 1974) (corporation found capable of conspiring with president of **[26]** corporation because the officer had "an independent personal stake in achieving the corporation's illegal objective.").[21] We apply this reasoning to the case at bar and find that members of the Board are capable of conspiring in violation of the Sherman Act.[22]

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[20] Judge Timony intimates that the terms "contract, combination . . . or conspiracy" probably have slightly different meanings." ID at 31, n.5. *citing FTC v. Retail Credit Co.*, 515 F.2d 988, 994 (D.C. Cir. 1975). Oppenheim, *Federal Antitrust Laws*, 178 n.1 (3d ed. 1968). We read the terms to be synonymous.

Our conclusion that the members of the Board are capable of conspiring is supported by the case law. The Supreme Court, in *Hoover v. Ronwin*, 466 U.S. 558, 575 (1984), acknowledged that the members of the Arizona committee of bar examiners—a state agency composed of practicing lawyers—could conspire with each other. In holding that their actions were immune under the state action doctrine because the challenged conduct was actually that of Arizona Supreme Court, the Court stated that "*[c]onspire as they might*," the committee members could not affect what was **[27]** ultimately within the control of the Arizona Supreme Court. *Id.* at 575 (emphasis added). Thus the Supreme Court has recognized that state board members are capable of conspiring with each other.

Finally, just as the discussions, voting and agreement in *Rothery* were sufficient to find that the conspiracy requirement was satisfied in that case, we find that the discussion, votes and promulgation of the challenged regulations in the case at bar are sufficient to satisfy the requirement here. *Rothery*, 792 F.2d at 1078–79.

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[21] Professor Philip Areeda has written that the actions of a state agency composed of members of the regulated industry are properly treated by the courts as concerted action. *See* P. Areeda, *Antitrust Law* §203.3c at 17 (Supp. 1982).

[22] Respondent argues that its regulations banning affiliation advertising flow from the broad grant of legislative authority expressed in Sections 72, 73A and 73B of Chapter 112, Mass Gen. Laws Ann. RAB 47. We disagree with this argument. The statutes cited by respondent simply establish the conditions under which optometrists may affiliate with non-optometrists. Judge Timony correctly found that opticians and optometrists, for example, may work together or in affiliation, if the optometrist practices in "separate premises" from the optician. Mass. Gen. Laws Ann. Ch. 112, §73B. IDF 48–49; CX 18R. Contrary to respondent's argument, Sections 72 and 73B, which describe the circumstances under which affiliations may occur, and Section 61, which permits truthful advertising, do not support a finding that the Legislature intended or even contemplated that respondent would promulgate the challenged regulations. We therefore conclude that respondent's argument is erroneous.

D. State Action Immunity

The state action immunity doctrine is the vehicle created by the Supreme Court to resolve conflict between the national policy of competition embodied in the federal antitrust laws and state regulation in our federal system. State action immunity shields the activity challenged here if: (a) the party is acting as the sovereign state; or (b) the state elects to insulate the conduct by adhering to certain narrowly prescribed procedures.

1. Conduct by the State as Sovereign

If a State, acting as sovereign, restrains competition, its actions are *ipso facto* immune from federal antitrust laws. *Hoover v. Ronwin*, 466 U.S. at 567–68. Respondent argues that as a [**28**] matter of state law, it exercises sovereign, statewide authority over the practice of optometry and that it is therefore immune from prosecution. RAB at 27.

We disagree. The Supreme Court has accorded only legislatures and courts status as sovereign. *Hoover v. Ronwin*, 466 U.S. at 568; *Bates*, 433 U.S. at 363. The Court has not accorded other state subdivisions status as the sovereign.[23] For example, although municipalities are state subdivisions, the Court has not accorded them status as the sovereign entity. *Community Communications Co. v. Boulder*, 455 U.S. 40, 44–50 (1981); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 411.

Further, federal appellate and district court rulings involving state regulatory boards have not held that such boards are, merely by virtue of their governmental status, "the state acting as sovereign" for purposes of immunity under *Parker v. Brown*, 317 U.S. 341 (1943). In *Federal Trade Commission v. Monahan*, 832 F.2d 688, 689 (1st Cir. 1987), *cert. denied*, 108 S. Ct. 1289 (1988), the First Circuit declared that the Massachusetts Board of Registration in Pharmacy is not the sovereign, but "a subordinate governmental unit."[24] In this and other cases, the [**29**] courts have looked to state policy as articulated in enactments of the legislature. *See, e.g., First American Title Co. of South Dakota v. South Dakota Land Title Association*, 714 F.2d 1439, 1451 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984); *Benson v. Arizona State Board of Dental Examiners*, 673 F.2d 272, 275 (9th Cir. 1982); *Gambrel v. Kentucky Board of Dentistry*, 689 F.2d 612, 618–20 (6th Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983); *Brazil v. Arkansas Board of Dental Examiners*, 593 F. Supp. 1354, 1361–68 (D. Ark. 1984),

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[23] *See New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978).

[24] The Massachusetts Board of Registration in Pharmacy and the Board of Registration in Optometry are two of several boards in the Massachusetts Division of Registration. Mass. Gen. Laws Ann. ch. 13, §§8, 9, 16–18, 22–25. Some of the basic powers and procedures of these two boards are set out in statutory provisions governing all of the boards in that Division. Mass. Gen. Laws Ann. ch. 112, §§61–65.

aff'd per curiam, 759 F.2d 674 (8th Cir. 1985); *United States v. Texas State Board of Public Accountancy,* 464 F. Supp. 400 (W.D. Tex. 1978), *modified per curiam,* 592 F.2d 919 (5th Cir.), *cert. denied,* 444 U.S. 925 (1979). Employing the same method of analysis as used in these cases, we hold that the respondent is not entitled to immunity as the sovereign.[25] **[30]**

2. Conduct That Is Immunized by the State

Second, under the state action doctrine, a state may insulate a regulatory regime from federal antitrust scrutiny where two criteria are satisfied. *California Retail Liquor Dealers' Association v. Midcal Aluminum, Inc.,* 445 U.S. 97, 105 (1980). First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy," and, second, the policy must be "actively supervised" by the state itself. *Id.* (quoting *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. at 410). However, in *Town of Hallie v. City of Eau Claire,* **[31]** 471 U.S. 34, 47 (1985), the Court held that the second prong of the *Midcal* test, *i.e.,* active supervision, need not be satisfied in the context of local government regulation where the defendant is an organ of local government. *See generally* ABA Antitrust Section, *Antitrust Law Developments* 606–11 (2d ed. 1984). We need not reach that question here as complaint counsel and respondent agree that the Commonwealth need not demonstrate active supervision to establish state action immunity in this case.

We now address the first, and determinative prong of the test. Is there a clear articulation of a state policy to displace competition by regulation in the case at bar? Massachusetts law provides the answer to this question. Section 61 of Mass. Gen. Laws Ann., ch. 112 states:

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[25] Respondent relies primarily upon three cases in support of its argument. First, in *Limeco, Inc. v. Division of Lime of the Miss. Dep't. of Agric. and Commerce,* 778 F.2d 1086, 1087 (5th Cir. 1985), the Fifth Circuit held, without discussion, that the Lime Division was an enterprise undertaken by the State to operate lime plants as a commercial enterprise, and, therefore, enjoyed sovereign immunity. Second, respondent cites *Deak-Perera Hawaii, Inc. v. Department of Transportation,* 553 F. Supp. 976 (D. Hawaii), *aff'd,* 745 F.2d 1281, (9th Cir. 1981), *cert. denied,* 470 U.S. 1053 (1985), where a state agency's grant of an exclusive currency exchange concession at an airport was found to be the action of the State of Hawaii acting as sovereign and entitled to state action immunity. (Following their earlier decision in *Deak-Perera,* the Ninth Circuit recently reached the same conclusion in *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.,* 810 F.2d 869, 875 (9th Cir. 1987), which involved a "factual setting nearly identical" with that in *Deak-Perera:* a grant of exclusive taxi privileges at the same airport as in *Deak-Perera.*) Third, in *Princeton Community Phone Book, Inc. v. Bate,* 582 F.2d 706 (3d Cir. 1978), *cert. denied,* 439 U.S. 966 (1978) the Third Circuit held that an advisory committee to the New Jersey Supreme Court was immune because it acted as the sovereign. Respondent argues that these cases recognize the virtual *per se* antitrust immunity afforded to state agencies.

None of the cases relied upon by the Board is dispositive. *Limeco* involved an executive department in that state, the Division of Lime. Rather than holding that the Division was the sovereign, the Fifth Circuit held that it was an enterprise undertaken by the state, which operated in accordance with the directives of the Mississippi Legislature. *Deak-Perera* and *Charley's Taxi* also do not appear to be dispositive. Although the *Deak-Perera* court held that a state executive agency, when operating within its constitutional or statutory authority, should be deemed to be the State acting in its sovereign capacity, the complaint and the evidence introduced here concern a defendant that has acted outside the statutory authority delegated by the State. At least two district courts have rejected arguments, based on *Deak-Perera,* that state regulatory agencies are automatically entitled to state action immunity because they act as the sovereign. *Bigelsen v. Arizona Bd. of Medical Examiners,* 1985–1 Trade Cas. (CCH) ¶66,488 (D. Ariz. 1985) (immunity does not apply to acts outside agency's statutory authority); *Flav-O-Rich, Inc. v. North Carolina Milk Commission,* 593 F. Supp. 13, 16 (E.D.N.C. 1983) (agency entitled to immunity only when it acts pursuant to clearly articulated state policy to displace competition), *aff'd,* 734 F.2d 11 (4th Cir.), *cert. denied,* 469 U.S. 853 (1984). Finally, the Board's reliance on *Princeton Community Phone Book* is unpersuasive. That case is pre-*Hoover* and contrary to *Hoover's* result.

> [e]xcept as otherwise provided in this chapter, *no such board shall make any rule or regulation prohibiting the advertising* or dissemination of truthful information concerning the price, nature and availability of goods and services to consumers *the effect of which would restrain or lessen competition.* (emphasis added).

In promulgating this law, the Massachusetts Legislature declared that:

> any ordinance, rule or regulation promulgated by an agency of the commonwealth or political subdivision thereof which prohibits or limits competitive advertising relating to the price of consumer goods or services shall be void as against public policy.[26]

Rather obviously, the Commonwealth articulated a policy *favoring*— [32] *not displacing*—competition.[27] (It is probably not mere coincidence that this legislation was enacted shortly after the Supreme Court's decision in *Bates*).[28] Finding no clear articulation to displace competition by state regulation,[29] we [33] find that the state action immunity doctrine is inapplicable to the instant case.[30]

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[26] Mass. Gen. Laws Ann., ch. 112, §61. IDF 11 (emphasis added).

[27] Judge Timony has noted that two organs of the Commonwealth's government, the Massachusetts Executive Office of Consumer Affairs and the Massachusetts Department of the State Auditor have specifically criticized the anticompetitive nature of these regulations. IDF 88-99, 107-09.

[28] In *Bates*, the Supreme Court held that governmentally imposed bans on advertising of professional services violated the First Amendment. 433 U.S. at 350.

[29] The Commission is not persuaded that the three cases cited by respondent in its motion of May 1, 1987, support its claim of state action immunity. In *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9 (1st Cir. March 30, 1987), the Court held that the Massport was entitled to state action immunity on two grounds. First, the court stated that the Supreme Judicial Court in Massachusetts had explicitly recognized that Massport resembles a municipal corporation and also possesses the powers of eminent domain and bonding authority. In this case, however, there has been no such judicial recognition nor does respondent possess such powers. Second, Circuit Judge Breyer, speaking for the court, held that Massport was acting pursuant to a clearly articulated and affirmatively expressed state policy. The Commission has found otherwise here. Moreover, in his opinion for the court in *Federal Trade Commission v. Monahan*, Judge Breyer distinguished *Massport*. In *Monahan*, the Commission sought to enforce investigative subpoenas directed to the Massachusetts Board of Registration in Pharmacy. Judge Breyer held that the Pharmacy Board, unlike Massport, was not clearly inside "the area of immunity delineated by clear state policy." *Monahan*, 832 F.2d at 690. He concluded that the immunity status of the Pharmacy Board could only be determined after the completion of the FTC investigation.

In *United States v. State Board of Certified Public Accountants*, No. 83-1947, Trade Reg. Rep. (CCH) ¶67,516 (E.D. La. March 11, 1987), the court found that the state statute regulating advertising by professionals specifically authorized the Board to issue the challenged regulations. Further, the challenged rules were reviewed and approved by the state legislature in accordance with state law, thus making the Board's actions the actions of the legislature. The record in the case at bar does not present similar facts.

Finally, as discussed above, the Ninth Circuit's decision in *Charley's Taxi* rests on that court's earlier decision *Deak-Perera*. As we have indicated, the Commission does not believe that these cases are dispositive.

[30] Respondent urges that complaint counsel has failed to establish that the state regulation in issue has been preempted by the federal antitrust laws. Respondent has confused the relationships between the law of federal preemption and state action immunity. We have addressed the requirements of a state action immunity and found respondent's argument wanting. It is *not* state action. Accordingly, the conduct at bar is *private*. The laws on preemption would be relevant only if there were some conflict between state—not private—action and a federal statute.

E. Unfair Acts or Practices

Complaint counsel allege, and Judge Timony has found, that respondent has committed unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (1982). In considering whether conduct is unlawful as an unfair act or practice, the test is whether the consumer injury is: (1) substantial; (2) not outweighed by any offsetting consumer or competitive benefits that the practice produces; and (3) one which consumers could not reasonably have avoided. *Orkin Exterminating Co.*, 108 FTC 263 (1986), *aff'd, Orkin Exterminating Co. v. Federal Trade Commission*, 1988–1 Trade Cas. **[34]** (CCH) §67,969 (11th Cir. April 19, 1988); *International Harvester Co.*, 104 FTC 949, 1061 (1984); *Amrep Corp.*, 102 FTC 1362, 1669 (1983); *Horizon Corp.*, 97 FTC 464, 849 (1981).[31]

Having found respondent to have violated the federal antitrust laws, we need not reach the question of whether respondent has committed an unfair act or practice.

F. Mootness

Respondent argues that the repeal of three of the challenged regulations in November 1985 has mooted all claims and foreclosed all relief based on these regulations. RAB at 49. The legal principles for determining when an issue is moot, and thereby requiring dismissal, indicate that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of that practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Otherwise, the defendant would be "free to return to his old ways." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). As the Supreme Court held in *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952): **[35]**

> [W]hen defendants are shown to have . . . entered into a conspiracy violative of the antitrust laws, courts will not assume that it had been abandoned without clear proof. . . . It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption.

Thus, when the respondent has voluntarily ceased the challenged activity, a case is not moot unless there is a showing "that there is no reasonable expectation that the alleged violation will recur and that interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Conyers v. Reagan*, 765 F.2d 1124,

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[31] *See also FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244–45 n. 5 (1972); *Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction*, letter from the FTC to Senators Ford and Danforth, December 17, 1980 ("Unfairness Statement"), reprinted at Trade Reg. Rep. (CCH), Transfer Binder, Current Comment 1969–1983 ¶50,421 at 55,948.

1128 n.9 (D.C. Cir. 1985); *see also County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). The relevant factors to be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance, and in some cases, the character of the past violations." *W.T. Grant Co.*, 345 U.S. at 633. The burden of these demonstrations is a heavy one, and falls on the respondent. *In Re Center for Auto Safety*, 793 F.2d 1346, 1352 (D.C. Cir. 1980). In our view, the respondent has not met its burden in this case.

The only assurance we have that the respondent has permanently ceased its anticompetitive practices is its argument that repeal of the regulations is tantamount to abandonment. However, the Commission notes that the respondent made a similar claim in an August 1983 letter to the Massachusetts State Auditor, responding to criticism from the State Auditor that Board regulation 3.12 injured consumers because it prevented **[36]** optometrists from offering discounts. IDF 93. Contrary to its protests regarding "time spent on matters which have become obsolete," respondent subsequently issued revised regulations that explicitly banned advertising discounts. IDF 102. Respondent's prior claim to have eliminated a challenged regulation, only to readopt it in another form, leads the Commission to conclude that respondent has not met its burden to prove the "bona fides" of its expressed intent to comply.

Second, although respondent has repealed the three challenged regulations, and claims that it will not reenact or enforce the repealed regulations, the Commission concludes that the respondent has not met its burden to prove effective discontinuance of the illegal activity. The issue is not whether the respondent will reenact the repealed regulations. The focus is more properly on whether the respondent will engage in repeated violations of the same law, namely, imposing anticompetitive restraints on truthful advertising, and not merely with repetition of the same offensive conduct. *TRW, Inc. v. FTC*, 647 F.2d 942, 953 (1981). In our view, respondent's failure to disavow its position that the challenged advertisements are inherently deceptive demonstrates that respondent sees no legal constraint to engaging in similar conduct in the future.

Finally, respondent's continuation of unlawful conduct for years after it had knowledge that the rules and practices were illegal and probably unconstitutional speaks to the serious **[37]** nature of the violative activity. The ALJ found that respondent's conduct was "egregious." ID 50. This characterization was based upon respondent's persistent refusal over a period of years to modify its regulation despite "knowledge that [they] were illegal and probably unconstitutional." ID 50.

Nine years ago, in 1977, respondent became aware of the *Bates* decision regarding the legality of restraints on advertising by professionals banning truthful advertising, including one prohibiting the advertising of discounts. IDF 83. In 1981, the Massachusetts Executive Office of Consumer Affairs notified respondent that its advertising restraints, including its prohibition of discount advertising, were unduly restrictive in light of *Bates*. IDF 84. Nevertheless, respondent continued to enforce its prohibition of discount advertising. IDF 117–33. In 1983, in a written report, the Massachusetts State Auditor criticized respondent's rule because it prevents "optometrists from offering reduced fees to certain consumer groups, such as senior citizens. . . ." IDF 98. Yet in 1984, respondent adopted Section 5.11(1)(f) which explicitly banned discount advertising. IDF 102. Respondent vigorously enforced this regulation, IDF 126–133, until just prior to the issuance of the complaint in this matter. ID 49, IDF 132.

In light of the record in this case, we agree with Judge Timony that there is "some cognizable danger of recurrent [**38**] violation." ID 50. Therefore, we conclude that the complaint cannot be dismissed on grounds of mootness.

III. THE ORDER

We conclude that an order prohibiting respondent from continuing to engage in the same or similar unlawful activities in the future is in the public interest. After considering the record in this case and the arguments of counsel for both parties, we have decided to issue an order that differs in some respects from Judge Timony's order. Our discussion of each section of the final order includes an explanation of the changes that have been made.

A. *Part I of the Order*

Part I of Judge Timony's order contains definitions of terms used in the order. Part I.F. defines price advertising as advertising the price of any optometric service or optical good. As complaint counsel argue, the definition in Judge Timony's order does not make clear that the order would cover ads that provide price information, including credit terms or statements such as "reasonable prices," in addition to ads that make specific price claims. We agree and have modified Part I.F. accordingly. [**39**]

B. *Part II of the Order*

Part II.A of Judge Timony's order prohibits acts by respondent to prevent the advertising of discounts. It also prevents respondent from restricting the offering of discounts. Complaint counsel argue that the evidence in this case establishes a risk that respondent will seek to interfere with other forms of price advertising and that, therefore, fencing-in relief is needed for price advertising. As we noted in *AMA*, "it is especially important that price advertising remain as unfettered as possible." 94 FTC 1030. In this case, the evidence introduced reveals that respondent has exhibited hostility to various forms of price advertising, not merely discounted prices. For example, its October 1984 rules prohibited "[a]dvertising which offers gratuitous services, rebates, discounts, refunds or otherwise, with the purpose of increasing the number of private patients. . . ." 246 C.M.R. §5.11(f). We agree with complaint counsel's conclusion that the evidence suggests a basic opposition to competition among optometrists based on price, and a likelihood that respondent might seek to prohibit or restrict other forms of price advertising besides the offering of discounts, absent a broader remedial provision. Part II.A has therefore been modified to include this fencing-in relief.

Part II.B of the order has not been changed. Parts II.C and II.D of the order have been revised to clarify the scope of the **[40]** provisions. Finally, the proviso at the end of Part II, which permits the regulation of false and deceptive advertising, has been clarified to limit the proviso to actions based on a reasonable belief that statutory restraints on advertising are violated.[32] Under Judge Timony's order the proviso may have been interpreted to allow respondent to argue that it may ban advertising on the basis of statutes aimed not at advertising but at other conduct.

C. *Part III*

Part III of Judge Timony's order has not been changed.

D. *Part IV*

A new Part IV.A has been added to require respondent to repeal its current regulation banning affiliation advertising. 246 C.M.R. §5.07(3). This order was originally proposed by complaint counsel before Judge Timony, who rejected it because the complaint had not charged that the regulation was preempted by the FTC. We agree with Judge Timony's observation that this is not a preemption case. *See* Footnote 30 *supra*. However, having found that respondent has unlawfully conspired to prohibit **[41]** the advertising of affiliations between optometrists and optical retailers, the Commission has the authority to issue an order eliminating that unlawful activity. The Commission has the authority to fashion appropriate relief, so long as the remedy selected has a "reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946). We conclude that repeal of the affiliation advertising ban is reasonably related to respondent's violation, and necessary to obtain comprehensive relief. If the Commission were to issue an order that did not include repeal, leaving the regulation on the books would have a chilling effect on those who, for whatever reason, are unaware that respondent is barred from enforcing it. The Commission, therefore, has added Part IV.A, which requires respondent to repeal Rule 5.07(3).

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[32] By "reasonable belief," we mean a belief that is based on the relevant facts and legal precedents. *See Rhode Island Board of Accountancy*, Dkt. No. 9181 (consent order issued February 25, 1986).

Part IV.B requires respondent to notify Massachusetts optometrists of the issuance of the cease-and-desist order in this case. Respondent argues that the Commission is without authority to issue "notification" orders. RAB 119. Relying on cases interpreting the powers of the Consumer Product Safety Commission, respondent contends that the Commission is authorized only to issue cease and desist orders. *See Barrett Carpet Mills Inc. v. Consumer Product Safety Commission*, 635 F.2d 299 (4th Cir. 1980); *Congoleum Industries Inc. v. Consumer Product Safety Commission*, 602 F.2d 220 (9th Cir. 1979).

We disagree. The Commission's authority to issue remedial orders requiring respondents to make affirmative disclosures, **[42]** including sending notices to affected parties, is well-established. *See e.g., Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1439 (9th Cir. 1986); *Amrep Corp. v. FTC*, 768 F.2d 1171, 1180 (10th Cir. 1985), *cert. denied*, 475 U.S. 1034 (1986); *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 756–62 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). *See also American Medical Association*, 94 FTC 701, 1039–40 (1979), *aff'd*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 452 U.S. 960 (1982). Respondent's reliance on cases holding that the Consumer Product Safety Commission lacked authority to order a program of notification, recall, and repurchase is misplaced, because neither case addressed the issue of affirmative disclosures independent of a restitution program, of which notice was an integral part.[33] We therefore, have not changed Part IV.B of the order.

Parts IV.C and IV.D of the order contain reporting and recordkeeping requirements. Respondent claims that those provisions are onerous and should be modified or eliminated. RAB at 120. Respondent has made no attempt to show undue burden or in what respects the provisions should be modified. The **[43]** requirements are all limited in time and scope and are reasonably related to respondent's violation. They remain unchanged.

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[33] Both of the cases cited by respondent were premised on the decision in *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974), which held that Section 5(b) of the Federal Trade Commission Act does not empower the Commission to order a respondent to pay restitution to injured consumers. The court in *Heater* viewed restitution as a "private" remedy outside the Commission's authority. In *Heater*, the Ninth Circuit Court of Appeals specifically recognized the Commission's authority to order affirmative relief, 503 F.2d at 323 n.7 and 324 n.13, and recently, in *Southwest Sunsites*, 785 F.2d at 1439, that court reaffirmed that affirmative disclosure remedies do not constitute the retroactive private relief condemned by *Heater*.

CONCURRING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

I concur in sections I, IIB, IID, IIF and III of the Commission decision in this case. In addition, I concur in all aspects of the Final Order. Because I conclude that the Massachusetts Board of Registration in Optometry ("Respondent" or "Board") has engaged in unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, I do not reach the question of whether respondent has engaged in unfair methods of competition.

The Commission's Unfairness Jurisdiction

The Commission was granted specific jurisdiction over "unfair or deceptive acts or practices" in 1938 when Congress enacted the Wheeler-Lea Act, ch. 49, 52 Stat. 111 (1938). Since that time, this unfairness jurisdiction has played an integral role in shaping the Commission's pro-consumer mission. Indeed, the unfairness jurisdiction has been an important basis for the Commission's law enforcement efforts in both individual cases[1] and in trade regulation rules.[2] [2]

Consumer unfairness is not defined precisely by statute. Rather, its meaning has evolved over a fifty-year period, with governing standards gleaned from the case law and rules. The basic premise underlying this broad grant of authority to combat unfairness is to protect consumers from coercion, the suppression of important information or similar practices.[3]

The framework for analyzing whether or not challenged conduct is an unfair act or practice was synthesized by the Commission in its 1980 policy statement on the scope of consumer unfairness jurisdiction. *See* FTC Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, letter from the FTC to Senators Ford and Danforth, *reprinted in* [1969-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,421 (Dec. 17, 1980) (hereinafter cited as "Unfairness Statement"). The Unfairness Statement focuses primarily on two criteria in order to **[3]** demonstrate the existence of legal unfairness: substantial consumer injury or the violation of established public policy.[4]

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[1] *See, e.g., FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

[2] *See, e.g.*, Trade Regulation Rule on Credit Practices, 16 C.F.R. §§ 444.1-.5 (1988) (prohibiting various credit practices); Trade Regulation Rule on Advertising of Ophthalmic Goods and Services, 16 C.F.R. §§ 456.1-.9 (1988) (requiring optometrists to provide consumers copies of their lens prescriptions); Trade Regulation Rule on Labeling and Advertising of Home Insulation, 16 C.F.R. §§ 460.1-.24 (1988) (requiring sellers of home insulation to provide specified product information in order to enable consumers to compare the efficiency of competing products).

[3] *See* Companion Statement on the Commission's Consumer Unfairness Jurisdiction Accompanying FTC Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, letter from the FTC to Senators Ford and Danforth, *reprinted in* [1969-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,421 at 55,951 (Dec. 17, 1980).

[4] As noted in the Unfairness Statement, these criteria were a refinement of factors first identified by the Commission in 1964 in its Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964). The criteria also were cited with approval by the Supreme Court of the United States in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 n.5 (1972).

To meet the consumer injury unfairness criterion, three tests must be met. First, the injury must be substantial. Second, the injury must not be outweighed by any offsetting consumer or competitive benefits that the practice produces. Finally, the injury must be one which consumers could not reasonably have avoided.

To meet the public policy criterion, the policy must be clear and well-established (*e.g.*, declared or embodied in formal sources such as statutes or judicial decisions). In most (if not all) matters, an act or practice that violates public policy will also cause substantial consumer injury. Accordingly, there usually is no need for separate analysis of the public policy criterion. Indeed, the Commission's Unfairness Statement correctly notes that the public policy criterion has been used by the Commission most frequently as a means of providing additional [4] evidence on the extent of consumer injury.[5] *See* [1969–1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,421 at 55,949.

Recent Applications of the Unfairness Statement

The Commission has adopted and applied the reasoning of the Unfairness Statement in its subsequent decisions. The first opportunity for the Commission to apply its then recently-issued Unfairness Statement to the facts of an adjudicated proceeding was in *Horizon Corp.*, 97 FTC 464, 849–52 (1981). In that case, the Commission found that a land sales company's retention of all sums paid in the event of buyer default was, under the circumstances, an unfair act or practice.

A unanimous Commission held that Horizon Corp.'s one-hundred percent forfeiture provisions enabled that firm to retain sums greatly in excess of any actual damages occasioned by purchaser default—thus satisfying the substantial injury test contained in the Unfairness Statement. The Commission also was unable to detect any countervailing benefits to consumers or competition [5] produced by the practice. Finally, the Commission concluded that the forfeiture clauses reasonably could not have been avoided by consumers who were unable to bargain over these clauses. Moreover, these clauses were contained in a contract that was adhesive in nature and signed in an atmosphere of deceptive misrepresentations by the seller about the value of the investment and the nature of the deal being offered under the contract.[6]

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[5] In light of the Massachusetts statute providing respondent only limited authority to regulate advertising, Mass. Gen. Laws Ann., ch. 112, § 61, it could be argued that respondent's acts or practices challenged in this case violate established public policy. After all, in enacting this statute, the Massachusetts Legislature declared that regulations which "limit competitive advertising relating to the price of consumer goods or services shall be void as against public policy." *Id.* However, because I conclude that respondent's acts or practices are covered by the consumer injury unfairness criterion, I need not reach the public policy criterion.

[6] The Commission in *Horizon Corp.* also found the company culpable under an unfair acts or practices theory based upon the firm's violation of public policy. The Commission cited the Uniform Commercial Code's unconscionable contract provisions as well as various specific federal and state statutes pertaining to forfeiture clauses as evidence of a developing public policy against provisions such as the one used by Horizon Corp. in its adhesion contracts.

In 1983, the Commission applied the consumer injury analysis to another land sales company's practices to find that firm in violation of the unfair acts or practices prohibition of Section 5. *Amrep Corp.*, 102 FTC 1362, 1644-46 (1983), *aff'd*, 768 F.2d 1171 (10th Cir. 1985), *cert. denied*, 475 U.S. 1034 (1986). In that case, the Commission found that the consumer injury amounted to more than $200 million in one "development" alone and thus constituted substantial consumer injury. In addition, the Commission could identify no countervailing benefits stemming from Amrep Corp.'s misrepresentations. Finally, the Commission determined that non-sophisticated investors reasonably could not [6] have avoided consumer injury in the face of the sales tactics employed by Amrep Corp.

In *International Harvester Co.*, 104 FTC 949, 1060–62, 1064–67 (1984), the Commission again found a firm liable under an unfairness theory. In that case, the Commission found substantial consumer injury because the respondent's failure to disclose that certain of its gasoline-powered tractors were subject to "fuel geysering" caused serious personal injury and even death. With respect to the countervailing benefits test, the Commission determined that no benefit from the firm's nondisclosure was even remotely sufficient to compensate for the human injuries involved. Finally, the Commission found that consumers could not reasonably have avoided injuries because they were not informed by the company of the importance of certain precautions.

The most recent Commission decision to apply the analysis set forth in the Unfairness Statement was *Orkin Exterminating Co.*, 108 FTC 263 (1986), *aff'd*, 5 Trade Reg. Rep. (CCH) ¶ 67,969 (11th Cir. April 19, 1988). In *Orkin*, the respondent for several years had offered termite and pest control service contracts to consumers with guarantees for the lifetime of the treated structure as long as the consumer paid a pre-determined annual renewal fee. Despite the "lifetime" guarantees in the contracts, Orkin claimed its costs were rising and unilaterally raised the renewal fees. [7]

Once again, the Commission applied the three tests of the consumer injury criterion of the Unfairness Statement and concluded that Orkin's conduct constituted an unfair act or practice. With respect to the first test, the Commission found that the failure to honor some 207,000 contracts representing over $7.5 million in increased renewal revenue in an approximately four-year period constituted "substantial" consumer injury. 108 FTC at 362.[7]

On the issue of countervailing benefits, the Commission found that consumers received nothing from the increase in annual renewal fees other than the additional burden of paying more for Orkin's services than agreed upon originally. The Commission also found that raising the annual renewal fee did not enhance competition. *Id.* at 364–65.

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[7] The Commission also specifically noted that the financial injury to each individual consumer was relatively small if measured on a yearly basis. Yet, the injury was deemed to be substantial because it did "a small harm to a large number of people." 108 FTC at 362

Finally, the Commission determined that consumers reasonably could not have avoided the injury. For one thing, Orkin's competitors did not offer similar "lifetime" price guarantees. Moreover, the Commission also held that mitigation of injury for Orkin's breach of contract by utilizing competing pest control companies might not be satisfactory. Consumers still would incur transactions costs in searching for reliable firms willing to [8] provide the same service on the same terms Orkin had offered in its original contracts. *Id.* at 366–68.

The United States Court of Appeals for the Eleventh Circuit recently affirmed the Commission's decision in *Orkin. See Orkin Exterminating Co. v. FTC,* 5 Trade Reg. Rep. (CCH) ¶ 67,969 (11th Cir. April 19, 1988). In doing so, the appellate court accepted and applied the three tests developed by the Commission to determine whether the consumer injury criterion has been met. *Id.* at 57,937–40. For example, the court wrote:

> [T]he Commission's three-part standard does little to isolate the specific types of practices and consumer injuries which are cognizable. But "the consumer injury test is the most precise definition of unfairness articulated by either the Commission or Congress"; consequently, we must resolve the validity of the Commission's order "by reviewing the reasonableness of the Commission's application of the consumer injury test to the facts of this case, and the consistency of that application with congressional policy and prior Commission precedent."

Id. at 57,938 (quoting *American Financial Services v. FTC,* 767 F.2d 957, 972 (D.C. Cir. 1985)). In addition, the Eleventh Circuit concluded: "Thus, because the Commission's decision fully and clearly comports with the standard set forth in its Policy Statement, we conclude that the Commission acted within its section 5 authority." *Id.* at 57,940.

Analysis of Respondent's Conduct

The actions taken by respondent created conditions comparable to those at issue in three of the four previous cases that have applied the Commission's Unfairness Statement. These three cases (*Horizon Corp., Amrep Corp.* and *International Harvester Co.*) dealt with the failure of respondents to provide consumers with truthful and nondeceptive information that would contribute to making informed decisions concerning the purchase or use of the product or service involved. Similarly, consumers here have not been provided with truthful and nondeceptive information that would contribute to making informed decisions concerning the purchase or use of the product or service involved. However, the case at hand differs from these preceding cases in two regards.

First, the Board itself has not failed to provide consumers with truthful and nondeceptive information concerning the purchase of optometric services. Rather, it has prohibited licensed optometrists from providing consumers with truthful and nondeceptive information likely to be relevant to consumers interested in purchasing optometric services. This difference, however, is not determinative.

The Commission, in prior cases involving its unfairness jurisdiction, has examined prohibitions on certain types of advertising by private associations of professionals. These private professional associations, like governmental state boards, do not themselves advertise specific prices and services to the public. Instead, they seek to regulate the advertising **[10]** practices of members of the associations, and sometimes impose sanctions on professionals who fail to abide by the established codes.

The preeminent case in this area is *American Medical Association*, 94 FTC 701, 1010–11 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 445 U.S. 676 (1982) (order modified 99 FTC 440 (1980) and 100 FTC 572 (1982)). In that case, the Commission found that the American Medical Association's ("AMA's") code of ethics proscribed "almost all advertising and promotional activity" by physicians. *Id.* at 1004. The Commission concluded that the AMA's virtual ban had at least three adverse consequences on competition. First, the ban made it more difficult for consumers to locate the lowest-cost qualified physicians. Second, it isolated physicians from competition—including making it more difficult for new physicians to enter into direct competition with established physicians. Third, it also reduced the incentive for physicians to price competitively. *Id.* at 1005.

The Commission held that the AMA's advertising restrictions constituted both unfair methods of competition and unfair acts or practices within the meaning of Section 5 of the FTC Act. Neither of these bases for liability was disturbed on appeal. Thus, certain restrictions on advertising practices imposed by an organization may constitute unfair acts or practices just as a decision by individual entities not to advertise in certain circumstances may be an unfair act or practice. **[11]**

The second difference from the three previous unfair acts or practices cases cited is that respondent has invoked the coercive power of the Commonwealth to prevent the dissemination of information to consumers. This coercive power of the Board extends not only to preventing noncomplying optometrists from earning a livelihood in their chosen profession, but also to the ability to seek criminal sanctions, including fines and imprisonment, for violations of its rules and regulations. Certainly, one would expect such coercive threats to deter many optometrists from using the types of truthful and nondeceptive advertising prohibited by respondent. The record shows in fact that the Board's regulations and its enforcement of those regulations reduced the dissemination of truthful and nondeceptive information to consumers (IDF 117–32, 134–46, 150, 152–54, 159, 172–75).

This second difference also is not determinative. As discussed in more detail below, respondent has proscribed truthful and nondeceptive advertisements in contravention of the law of Massachusetts. The Board, therefore, has not acted within the scope of its mandate with respect to these regulations. Accordingly, it has forfeited its claim to preferential treatment relative to private associations of professionals that restrict their members.

Turning to the three tests of the consumer injury unfairness criterion, I address first whether the consumer injury that results from respondent's acts or practices is substantial. The **[12]** Administrative Law Judge ("ALJ") found that more than $100 million is spent on eyecare annually in Massachusetts (IDF 55);[8] that restrictions on advertising in the market for optometric goods and services raise prices and total costs to consumers without improving quality (IDF 62); that advertising has the effect of lowering the total cost, including out-of-pocket and search costs, of optometric goods and services (IDF 60, 65, 176, 178); that prices are lower for eye examinations and for optical goods in states where advertising is permitted than they are in Massachusetts (IDF 77–78, 177); and that the supply of optometric goods and services in Massachusetts may be lower than they would be absent the advertising restrictions at issue in this case (IDF 79). I agree with these factual findings and note that respondent does not challenge them. I therefore conclude that the consumer injury that results from respondent's acts or practices is substantial. **[13]**

The second test of the consumer injury unfairness criterion is whether the consumer injury is outweighed by any offsetting consumer or competitive benefits produced by the practice. Interestingly, respondent has not even attempted to justify its complete ban on discount advertising. Further, respondent has not proffered any ostensible offsetting consumer or competitive benefits that would justify its restrictions on advertising that uses testimonials or advertising that the Board believes is sensational or flamboyant. Thus, as to the bans on discount advertising, advertising that uses testimonials or advertising that the Board believes is sensational or flamboyant, the record does not show any offsetting consumer or competitive benefits. Consequently, I conclude that there are indeed no such offsetting consumer or competitive benefits.

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[8] The ALJ's Initial Decision does not specify what portion of this $100 million market is served by optometrists. However, in the unfair acts or practices discussion of its *AMA* decision, the Commission addressed the question of whether injury could be substantial where the dollar amounts of injury were not calculated specifically: "While it is impossible to quantify precisely how much of the aggregate annual expenditures for physician services represents consumer injury attributable to the challenged restrictions, we are convinced that the record in this case supports a finding of substantial injury." 94 FTC at 1011. This statement also holds true for the acts or practices of respondent given the size of the market and the potential consumer benefits from the prohibited advertising.

Respondent has asserted that three "costs" are associated with affiliation advertising: (1) affiliation advertising is alleged to be "a species of false and deceptive advertising"; (2) affiliation advertising is alleged to "obfuscate the relationship between optometrists and retail optical establishments and simulate unlawful forms of optometric practice"; and (3) affiliation advertising is alleged to "enable commercial firms to exert undue influence over optometrists." (RAB at 74–82, 96–97.) The relevant questions are whether respondent has correctly identified costs of affiliation advertising, and if so, whether these costs outweigh the benefits to consumers to such an extent as to justify a complete prohibition of such advertising. [14]

As to these questions, I concur with the reasoning of the Commission decision that the truthful advertising of a lawful business relationship is not inherently deceptive. The wholesale prohibition of all affiliation advertisements here is not justified merely because some such advertisements may be deceptive.[9] I also agree with the Commission's conclusion that the respondent's "undue influence" argument is merely camouflage for a distaste for competition among optometrists.

In each of the types of advertisements cited by respondent there are far less restrictive ways to protect consumers from deceptive practices than to impose an absolute prohibition. Respondent has not explained why it needs to ban all truthful and nondeceptive advertisements simply because some advertisements may contain misleading claims. [15]

Respondent has every right, and indeed the obligation, to prevent the dissemination of false or deceptive advertisements. Unfortunately, respondent's broad restrictions are far more likely to insulate established optometrists from the rigors of competition than to protect consumers from deceptive optometric practices. Accordingly, I conclude that the consumer injury caused by respondent's ban on the various types of advertising at issue is not outweighed by any offsetting consumer or competitive benefits.

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[9] Indeed, respondent recognizes the benefits of affiliations. In its initial brief the Board states: "Referral relationships enable both optometrists and optical stores to offer their patients and customers, respectively, the convenience of 'one-stop shopping.' " (RAB at 79.) The Board also argues, however, that "even if some affiliation advertisements are not actually deceptive, they may be prohibited as an easily and often abused method 'to facilitate the large-scale commercialization which enhances the opportunity for misleading practices.' " (RAB at 78) (citing *Friedman v Rogers*, 440 U.S. 1, 15 (1979)). Respondent has failed to offer any record evidence that large-scale commercial chain optical establishments engage in misleading practices more frequently than other providers of optical goods and services. In fact, the ALJ found that no deceptive advertising complaints had ever been received by the Massachusetts Board of Registration of Dispensing Opticians against a chain and that no evidence was introduced to show that the Board ever charged any optometrists with false or deceptive advertising (IDF 47, 133).

The third test of the Commission's consumer injury unfairness criterion is whether consumers reasonably could have avoided the injury caused by the conduct. When consumers do not obtain sufficient information to make rational economic decisions, it is difficult, if not impossible, for them to avoid injury. The Unfairness Statement sets forth one indication of whether consumer injury is reasonably avoidable:

> Sellers may adopt a number of practices that unjustifiably hinder such free market decisions. Some may withhold or fail to generate critical price or performance data, for example, leaving buyers with insufficient information for informed comparisons. . . . Each of these practices undermines an essential precondition to a free and informed consumer transaction, and, in turn, to a well-functioning market. Each of them is therefore properly banned as an unfair practice under the FTC Act. [16]

Unfairness Statement, [1969–1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,421 at 55,949 (footnote omitted).[10]

An argument might be made that consumers could establish a clearinghouse for information about optometrists in Massachusetts, including which optometrists offer discounts and which are located near sellers of glasses and contact lenses. Such information gathering, however, is cumbersome and expensive. Moreover, optometrists might be concerned reasonably that any cooperation with the effort would be considered a violation of respondent's rules. Even if such a project were undertaken, dissemination of the findings to consumers of optical services would be costly and could become outdated quickly.

In *Orkin Exterminating Co.*, 108 FTC at 267–68, the Commission concluded that the costs of searching for suppliers of [17] services are germane to whether consumers reasonably could have avoided or mitigated the injury sustained from a respondent's acts or practices. The Commission's reasoning in *Orkin* is relevant as well to the search costs present in this case.

Alternatively, consumers could demand that the Board modify its rules to permit the dissemination of truthful and nondeceptive advertising by optometrists. Failing that, consumers could seek to change the membership of the Board. But, these options do not seem realistic for at least two reasons. First, it would require consumers to embark upon a process that is arduous, time-consuming, uncertain and expensive at best. Indeed, according to "the logic of collective action," a few individuals with a great deal at stake often can out-organize and defeat a much larger number of people who collectively have more, but individually have less, at stake.[11]

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[10] The fact that the Unfairness Statement uses the word "sellers" rather than the phrase "state boards" does not render this passage inapplicable. First, as section IIB of the Commission decision points out, the Commission has jurisdiction over respondent. Second, four of the five members of the Board are sellers of optometric services and the fifth member has not participated in any Board activities since December 1982 (IDF 3). As sellers of optometric services, Board members have an incentive to regulate in a manner that enhances their ability to compete. Third, in its analysis in the Unfairness Statement, the Commission cited *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) as support for the proposition that the withholding of information is properly condemned as an unfair practice under the FTC Act. Unfairness Statement, [1969–1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,421, at 55,949 n.21. This citation to a case involving the Virginia State Board of Pharmacy (a state board analogous to respondent) provides some indication of the Commission's intent to construe broadly the term "sellers."

Second, some other facts suggest that consumers may face an uphill climb. The Board consists of five members, four of whom are optometrists and the fifth is a public member who has not participated in any Board activities since December 1982 (IDF 3). In addition, both the Massachusetts Executive Office of Consumer Affairs, a cabinet office whose area of responsibility includes the Board, and the Massachusetts Department of the State Auditor have criticized the Board's advertising restrictions. It is unlikely that consumers would succeed rapidly where these two **[18]** arms of the Commonwealth of Massachusetts have failed (IDF 84–99).

In any event, it clearly is beyond the capability of an individual consumer, acting alone, to mount the types of concerted campaigns hypothesized above. The third test of whether consumers reasonably could avoid injury must be understood as an inquiry into individual options rather than group activism. To require more would stretch the qualifier, "reasonably," past the breaking point. Otherwise, one could always suppose some form of joint action that might suffice if taken to an extreme. For example, consumers in theory always could demand of a corporation that it change its unfair acts or practices, or seek to have its board of directors replaced. But such a standard illogically would place the burden of securing change upon the consumer victims and would allow the illegal practices to continue for the duration of any "reform efforts."

For all these reasons, I conclude that consumers reasonably could not have avoided the injury caused by respondent's conduct. In sum, then, respondent's conduct runs afoul of all three tests of the consumer injury unfairness criterion: the conduct has caused substantial consumer injury; the injury is not offset by corresponding consumer or competitive benefits; and the injury reasonably could not have been avoided by consumers. **[19]**

Respondent's Specific Arguments on the Unfairness Issue

Having explained why the respondent's conduct meets the legal standard for invoking the Commission's unfairness authority, I now turn to the three specific arguments raised by respondent in its appeal.[12] These arguments are: (1) governmental regulatory bodies do not engage in acts or practices **[20]** as those terms are used in the FTC Act; (2) the state action exemption applies to the Commission's unfair acts or practices jurisdiction; and (3) the conduct complained of is not unfair because the Board has determined that the beneficial effects of its regulations on the public health outweigh the alleged consumer injury.

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[11] M. Olson, *The Logic of Collective Action* (1965).

First, respondent argues that governmental regulatory bodies do not engage in acts or practices as those terms are used in the FTC Act. Nonetheless, the Commission successfully has asserted jurisdiction over several state boards for allegedly engaging in unfair acts or practices. Since each of these cases was resolved by consent agreement, the issue of jurisdiction has never been litigated fully. *See Wyoming State Board of Chiropractic Examiners,* 3 Trade Reg. Rep. (CCH) ¶ 22,477 (FTC Jan. 13, 1988); *Rhode Island Board of Accountancy,* 107 FTC 293 (1986); *Wyoming Board of Registration in Podiatry,* 107 FTC 19 (1986); *Montana Board of Optometrists,* 106 FTC 80 (1985); *Louisiana State Board of Dentistry,* 106 FTC 65 (1985).

Respondent questions whether governmental bodies ever can engage in "acts" or "practices" within the meaning of the FTC Act. At the outset, I conclude (as does the Commission in section IIB of its decision) that governmental entities are encompassed within the meaning of the word "person" in Section 5 of the FTC Act. If the Commission has jurisdiction over governmental entities, then it may examine the acts or practices of those entities. **[21]**

In addition, Congress purposely avoided enumerating or defining unfair acts or practices in the FTC Act.[13] When the unfair methods of competition language was enacted, Congress carefully considered whether to prohibit specific abuses, rather than provide general guidance to the Commission. In explaining its decision, the Senate Commerce Committee wrote:

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[12] When the Commission issued its Complaint against respondent on July 8, 1985, respondent was put on notice that the Commission was proceeding under both an "unfair methods of competition" theory and an "unfair acts or practices" theory. For example, paragraph 15 of the Complaint reads as follows:

> The combination or conspiracy and the acts and practices described above [in paragraphs 12 and 13 of the Complaint] constitute unfair methods of competition *or unfair or deceptive acts or practices that violate Section 5 of the Federal Trade Commission Act.*

Complaint, ¶ 15 (emphasis added). In addition, Administrative Law Judge Timony's Initial Decision specifically found liability on an unfair acts or practices theory, distinct from the liability he found under the unfair methods of competition theory. *See Massachusetts Board of Registration in Optometry,* Docket No. 9195 slip op. at 42–43 (June 20, 1986) (Initial Decision). Finally, both respondent and complaint counsel addressed this issue in their respective briefs before the Administrative Law Judge and the Commission. *See* Complaint Counsel's Brief in Support of Proposed Conclusions of Law, pp. 60–63 (April 28, 1986); Post-Trial Brief for Respondent Massachusetts Board of Registration in Optometry, pp. 59–60 (May 9, 1986); Complaint Counsel's Reply to Respondent's Post Trial Brief and Proposed Findings, p. 21 (May 16, 1986); Appeal Brief for Respondent Massachusetts Board of Registration in Optometry, pp. 59–61 (Aug. 8, 1986); Complaint Counsel's Answering and Cross-Appeal Brief, pp. 105–06 (Sept. 17, 1986). Therefore, the unfair acts or practices theory of liability properly is before the Commission.

[13] Indeed, the words "act" and "practice" are both defined broadly in dictionaries and are not defined so as to exclude the acts or practices of governmental bodies. *See, e.g., Webster's Third New International Dictionary* 20, 1780 (1976).

> The Committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into law it would be quite possible to invent others.

S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914). *See also* H.R. Rep. No. 1142, 63d Cong. 2d Sess. 19 (1914) ("It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case.").

This legislative history of the FTC Act indicates that governmental bodies may engage in acts or practices that are unfair. While Congress never addressed the specific issue, it **[22]** purposely drafted a broad statutory mandate that was to be expanded as warranted by new forms of conduct that ultimately injured consumers. The FTC Act contains several specifically identified industries that are exempted from its jurisdiction,[14] yet Congress never has precluded the Commission from prosecuting governmental entities.

Respondent's second argument is that its prohibition on truthful and nondeceptive advertising by professionals is exempt from scrutiny under the Commission's unfair acts or practices jurisdiction due to the state action exemption. The argument is made in conclusory fashion and no support is provided for it.

Assuming arguendo that the state action exemption applies to the Commission's unfair acts or practices jurisdiction, I conclude, for the reasons stated in section IID of the Commission decision, that the exemption is inapplicable on the facts of this case. The Massachusetts Legislature has not clearly articulated a state policy to install regulation and displace competition in advertising by optometrists. Instead, the Legislature has clearly articulated its insistence that a board, such as **[23]** respondent, shall not make "any rule or regulation prohibiting the advertising or dissemination of truthful information concerning the prices, nature and availability of goods and services to consumers the effect of which would restrain or lessen competition." Mass. Gen. Laws Ann., ch. 112, § 61 (1983). Any such rule or regulation promulgated by a board is declared "void as against public policy." *Id.*[15]

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[14] Section 5 of the FTC Act excludes from the Commission's jurisdiction banks, savings and loan institutions, common carriers, air carriers and persons, partnerships, or corporations subject to the Packers and Stockyards Act. *See* 15 U.S.C. § 45(a)(2). In addition, Congress has proscribed the Commission's authority to use funds to study agricultural marketing orders or to study, investigate or prosecute matters related to agricultural cooperatives. *See* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 20, 94 Stat. 393.

Respondent's final specific argument is that the restraints on truthful advertising are not unfair because the Board reasonably determined that the beneficial effects of its regulations on the public health outweigh the alleged consumer injury. This argument already has been addressed, in part, in the discussion of the second test of the consumer injury unfairness criterion. I concluded there, and restate here, that the consumer injury caused by the Board's acts or practices is **[24]** not outweighed by any offsetting consumer or competitive benefits.

This response, however, is not a complete reply to the Board's argument. The Commission is not intended to merely substitute its view of what constitutes "the public health" for that of the Board. Under our federalist system, the Board has a valid and lawful interest in regulating the level of public health and safety. Indeed, it is proper for the Commission to display considerable deference to the decisions of state entities. A mere preference for a different outcome would not justify Commission involvement. But when the Board oversteps its bounds and imposes regulations that cause substantial consumer injury and do not demonstrably improve public health, the Commission has the authority and the responsibility to examine the acts or practices.

There may well be some advertisements where some optometrists deceive some consumers in some fashion. Yet, the possibility that optometrists may deceive consumers in some circumstances does not justify a complete ban on entire areas of advertising absent a showing that consumers will be harmed significantly by such advertising. Moreover, the record in this case is clear that price advertising, affiliation advertising, testimonials and flamboyant advertisements, when truthful and nondeceptive, serve to provide immensely useful information to consumers. The benefits of this information, thus, exceed the cost of whatever action the Board may have to take in those few **[25]** instances where optometrists disseminate false or deceptive advertisements.

Just because a state board asserts that its regulations are intended to improve public welfare does not necessarily mean that those same regulations comport with federal statutes. At least where, as here, the Board operates in defiance of state legislation, ignores the criticism of two different state agencies, and causes substantial, unjustified and unavoidable interstate[16] consumer injury, respondent's prohibition on the dissemination of truthful and nondeceptive advertising constitutes unfair acts or practices.

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[15] Neither respondent nor complaint counsel has briefed the issue of whether the state action doctrine applies to the Commission's unfair acts or practices jurisdiction. In *Amrep Corp.*, 102 FTC 1362, 1621-22 (1983), the respondent argued that because the relevant states had enacted their own land sales disclosure and registration statutes, the state action exemption precluded Commission action on the basis of its unfair or deceptive acts or practices jurisdiction. The Commission held that the state action exemption was inapplicable in that case because "[n]o question of conflict with federal antitrust laws is involved here." Therefore, it is possible that the state action exemption is inapplicable to the Commission's unfair acts or practices jurisdiction inasmuch as the jurisdiction does not arise from a federal antitrust law.

Conclusion

Accordingly, I join in the Commission's order on the basis of the Commission's unfair acts or practices authority. I express no opinion about the Commission's unfair methods of competition authority as it relates to this case.

FINAL ORDER

This matter has been heard by the Commission upon the cross-appeals of respondent, Massachusetts Board of Registration in Optometry, and complaint counsel from the Initial Decision, and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in the accompanying Opinion, the Commission has determined to affirm in part and reverse in part the Initial Decision. Accordingly, the Commission enters the following order.

I.

It is ordered,, That for the purpose of this order, the following definitions shall apply:

A. "*Board*" shall mean the Massachusetts Board of Registration in Optometry, its officers, committees, representatives, agents, employees, and successors.

B. "*Discounted price*" shall mean a price that is less than the price the person or organization usually charges for the good or service.

C. "*Disciplinary action*" shall mean:

1. the revocation or suspension of, or refusal to grant, a license to practice optometry in Massachusetts, or the imposition of a reprimand fine, probation, or other penalty or condition; or

2. the initiation of an administrative, criminal, or civil proceeding.

D. "*Optical good*" shall mean any commodity for the aid or correction of visual or ocular anomalies of the human eyes, such as lenses, including contact lenses, spectacles, eyeglasses, eyeglass frames, and appliances.

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[16] *See* IDF 56-59.

E. "*Optometric service*" shall mean any service that a person duly registered and licensed to practice optometry under Mass. Gen. Laws Ann. ch. 112 §§ 66 *et seq.*, or any future recodification thereof, is authorized to provide pursuant to those statutory provisions.

F. "*Price advertising*" shall mean advertising information about the price of any optometric service or optical goods.

II.

It is further ordered, That the Board, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall cease and desist from, directly or indirectly, or through any rule, regulation, policy, disciplinary action or other conduct:

A. Prohibiting, restricting, impeding, or discouraging any person or organization from advertising or offering a discounted price or from otherwise engaging in price advertising;

B. Prohibiting, restricting, impeding, or discouraging the advertising or publishing of the name of an optometrist or the availability of an optometrist's services by a person or organization not licensed to practice optometry;

C. Prohibiting, restricting, impeding, or discouraging any advertising that uses testimonials and advertising that the Board believes is sensational or flamboyant;

D. Inducing, urging, encouraging, or assisting any person or organization to take any of the actions prohibited by this Part.

Nothing in this order shall prevent the Board from adopting and enforcing reasonable rules, or taking disciplinary or other action, to prevent advertising that the Board reasonably believes to be fraudulent, false, deceptive, or misleading within the meaning of Massachusetts General Laws, Chapter 112, Sections 71 and 73A, or that the Board reasonably believes to be otherwise unlawful under Massachusetts General Laws, Chapter, 112, Section 73A, or any future recodification thereof.

III.

It is further ordered, That this order shall not be construed to prevent the Board from engaging in activity protected under the First Amendment to the United States Constitution to petition for legislation concerning the practice of optometry.

IV.

It is further ordered, That the Board shall:

A. Within sixty (60) days after the date that this order becomes final, institute procedures to repeal 246 C.M.R. §5.07(3), and complete such repeal within a reasonable time thereafter;

B. Distribute by mail a copy of this order, and executed Appendix:

1. to each person licensed to practice optometry in Massachusetts within one (1) year after the date this order becomes final;
2. within thirty (30) days after this order becomes final, to each person whose application to practice optometry in Massachusetts is pending, and to each person who applies for five (5) years thereafter, within sixty (60) days after the filing of the application; and
3. to the Massachusetts Optometric Association, within sixty (60) days after the date this order becomes final;

C. Within one hundred twenty (120) days after the date that this order becomes final, and annually for a period of five (5) years on or before the anniversary of the date on which this order becomes final, submit a written report to the Federal Trade Commission setting forth in detail the manner in which the Board has complied with this order;

D. For a period of five (5) years after the date that this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, all documents and records containing any reference to any matter covered by this order.

Commissioner Strenio concurring.

APPENDIX

The Federal Trade Commission has issued an order against the Massachusetts Board of Registration in Optometry. This order provides that the Board may not prohibit or restrict:

1. offering, or truthful advertising that offers, discounted fees for goods and services provided by optometrists, or other truthful price advertising;
2. truthful advertising of an optometrist's name and the availability of his or her services by retail sellers of optical goods or other persons not licensed to practice optometry;
3. advertising that uses testimonials or that the Board believes is sensational or flamboyant.

The order does not affect the Board's authority to prohibit advertising that is fraudulent, false, deceptive, or misleading, or advertising that otherwise violates Massachusetts statutes.

Pursuant to the Federal Trade Commission's order, the Board has undertaken to repeal 246 C.M.R. §5.07(3), which states, in part, that a "licensee shall not permit or authorize the use of his name, professional ability or services by any person or establishment not duly authorized to practice optometry."

In conformity with the Federal Trade Commission's order, you are advised that the prohibition on advertising gratuitous services contained in 246 C.M.R. §5.11(1)(b) does not prohibit all advertising of gratuitous services. It only applies to those advertisements of gratuitous services prohibited by Massachusetts law, specifically M.G.L. c. 112 s. 73A. This statute prohibits "in any newspaper, radio, display sign or other advertisements . . . any statement containing the words 'free examination of eyes', 'free advice', 'free consultation', 'consultation without obligation', or any other words or phrases of similar import which convey the impression that eyes are examined free." The Board's rule is no broader than that statutory prohibition.

Pursuant to 246 C.M.R. § 5.11(6), the Board may require reasonable substantiation of a licensee's usual fees for services or goods, for the purpose of preventing the false, deceptive, or misleading advertisement of discounted fees by a licensee.

For more specific information, you should refer to the order itself, a copy of which is enclosed.

Chairman
Massachusetts Board of Registration
in Optometry

IN THE MATTER OF

REDMAN INDUSTRIES, INC., FLEETWOOD ENTERPRISES, INC., SKYLINE CORPORATION, AND COMMODORE CORPORATION

VACATING ORDERS IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Dockets C-2640, C-2641, C-2642, & C-2643. Consent Orders, March 4, 1975—Vacating Orders, June 16, 1988

The Federal Trade Commission has reopened proceedings and vacated consent orders, (85 F.T.C. 309, 414, 444, & 472), issued in 1975 against four mobile home companies, concerning the companies' failure to perform warranty services within a reasonable period of time and required the companies to establish and maintain warranty-related complaint and service systems. The Commission ruled that it would be in the public interest to reopen the proceedings and vacate the consent orders.

ORDER REOPENING THE PROCEEDINGS AND VACATING CEASE AND DESIST ORDERS

Petitioners Redman Industries, Inc., Fleetwood Enterprises, Inc., Skyline Corporation, and Commodore Corporation have each filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, to reopen the proceeding and vacate the order issued against it on March 4, 1975, in Docket No. C-2640, C-2641, C-2642 and C-2643 respectively.

The orders in this matter and a rulemaking proceeding arose out of an industry-wide investigation of the mobile home industry initiated in 1972. That investigation revealed that a substantial number of purchasers of mobile homes encountered difficulty in obtaining warranty performance to remedy defects appearing in mobile homes after delivery and occupancy. It appeared that the primary cause of warranty nonperformance involved disputes between the manufacturer and dealer over which had the responsibility for the defective condition giving rise to the request for warranty service. Such disputes generally revolved around the question of whether the defective condition was the result of defective materials or workmanship, which is the manufacturer's responsibility under its warranty, or was the result of improper "set up"[1], which is usually performed by and is the responsibility of the dealer. Although industry practice calls for the dealer to perform warranty service, that dealer will be reluctant to undertake repairs he deems to be the manufacturer's responsibility if there is a question as to whether he will be reimbursed by the manufacturer for such service.

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[1] The general practice of mobile home manufacturers has been to offer one-year warranties covering defects in materials and workmanship. Such warranties typically exclude "set up" from the scope of coverage. "Set up" involves preparing the ground (grading, compacting, etc.) at the home site, excavating foundation holes and filling them with concrete to make piers, setting blocks or jackstands on the piers, setting the home on the blocks or jackstands, leveling the home so it sets evenly on the blocks or jackstands, affixing the home to anchors in the ground by means of cables that hold it in place, and connecting utilities.

Unfortunately, attributing responsibility for a defective condition is not always simple. A number of defective conditions, *e.g.*, roof leaks, sagging floors, buckling walls, and improperly fitting or misaligned windows, doors, and cabinets can be attributable to either set up or defective materials or workmanship. Where such conditions existed, disputes over responsibility frequently arose and warranty service often went unperformed until the question was resolved.

The orders issued against the petitioners endeavored to remedy this warranty service problem by requiring:

1. completion of warranty service within specified time limits;
2. inspection of homes by respondent or its retailers at the time of tender of possession;
3. reinspection of homes within 90 days of tender of possession;
4. correction by respondent or its retailers of any defect discovered in a home or its set up during reinspection;
5. written agreements between respondent and its retailers delineating their respective responsibilities for warranty and warranty related service;
6. monitoring by respondent of retailers' warranty performance through purchaser questionnaires, periodic on-site reviews of retailers' service facilities and personnel, and retailer reports to respondent regarding mandatory inspections and reinspection;
7. self-monitoring by respondent of its fulfillment of warranty obligations through detailed internal monthly reports by personnel responsible for warranty service to company officials;
8. establishment by respondent of a prescribed warranty complaint handling procedure; and
9. extensive record keeping.

The proposed mobile home rule and the provisional acceptance of the four mobile home consent agreements were announced at the same press conference on December 26, 1974. The mobile home rule, as originally proposed, was essentially identical to the provisions of the mobile home orders. The four respondents apparently were targeted for enforcement action on the basis of size. They were four of the larger manufacturers of mobile homes. Commission staff did not deem their practices any worse than those of the industry as a whole. J. Thomas Rosch, then-Director of the Bureau of Consumer Protection, stated at the press conference that the orders would be superceded by any rule that was promulgated. This also appears to be the understanding of the respondents.

It later became apparent that there were serious flaws in the proposed regulatory scheme, and that the anticipated benefits consumers would derive from application of the proposed rule to the entire industry would be exceeded by the costs of implementing the proposed regulations. Primarily for this reason, the Commission terminated the mobile home rulemaking proceeding on November 19, 1986. The staff's cost/benefit analysis that demonstrated this flaw was based in large measure on data subpoenaed from Redman, Fleetwood, and Skyline. Petitioners argue that the cost/benefit analysis is a changed condition of fact that demonstrates that they are burdened with costly requirements that do not produce countervailing consumer benefits. This, they argue, places them at a competitive disadvantage and as a consequence is not in the public interest.

Petitioners also allege that regulation of this industry has changed significantly since the orders were issued. At the time the orders were negotiated, the mobile home industry and the manufacturer warranties assertedly received limited governmental review. The mobile home orders and the proposed rule were designed to remedy perceived problems that developed during the construction, transportation, and set up of mobile homes. Underlying warranty service problems stemming from the difficulty of attributing responsibility for a defective condition to the manufacturer or the dealer was the lack of uniform construction standards both with respect to the construction of the mobile home itself and its set up. However, petitioners argue, since that time the Department of Housing and Urban Development has promulgated regulations pursuant to the National Manufactured Home Construction and Safety Standards Act of 1974 ("Manufactured Home Act"), 42 U.S.C. 5401, *et seq.*, which protects mobile home purchasers by creating construction and safety standards for mobile homes.

In addition, petitioners argue that a number of states are regulating the industry. Seventeen states, accounting for almost one-half of all mobile home sales and one-half of the population of the United States, require that all mobile homes sold within these states be warranted by the manufacturer. Forty-one states, accounting for over 90% of mobile homes shipped, license or have bonding requirements which regulate mobile home manufacturers and dealers. In at least fourteen of these states, accounting for about 50% of all mobile homes, the licensing requirements are tied to warranty service. In addition, building codes in a number of jurisdictions now cover the set up of mobile homes.

Petitioners also argue that shortly after the provisional acceptance of the mobile home orders, the Magnuson-Moss Act became law. It established requirements for express warranties and prohibited certain limitations on implied warranties. Warrantors must include in their warranties the products or parts covered by warranty, what the warrantor will do in the event of a defect or malfunction, what the customer must do to obtain warranty performance, and other disclosures. In addition, Magnuson-Moss creates a private right of action against a warrantor who fails to comply with any obligation under the Act for damages and equitable relief, and a provision allowing for the recovery of costs and expenses including attorney fees.

Finally, petitioners assert that mobile homes purchased using Veteran's Administration and Federal Housing Administration financing, two of the principal sources of mobile home financing, must be warranted by the manufacturer.

FINDINGS

The basic showing required of a respondent to reopen a proceeding and have an order modified or vacated is set out in Section 5(b) of the Federal Trade Commission Act, which reads in pertinent part:

> "[T]he Commission shall reopen any such order to consider whether such order . . . should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part."

In addition to changed conditions of law or fact as grounds for reopening, the Commission will also reopen a proceeding if the public interest so requires. The additional ground is set out in Rule 2.51(b) of the Commission's Rules of Practice which governs the contents of requests to reopen:

> "A request under this section shall contain a satisfactory showing that changed conditions of law or fact require the rule or order to be altered, modified, or set aside in whole or in part, or that the public interest so requires. This requirement shall not be deemed satisfied if a request is merely conclusive or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modifications of the rule or order."

Commission practice has been to keep orders and rulemaking proceedings separate. Orders are issued when violations of the Federal Trade Commission Act have occurred (in the case of a litigated order) or when the Commission has reason to believe violations have occurred (in the case of consent orders). Rulemakings, broadly speaking, are proceedings to determine whether an industry-wide rule will benefit consumers and further the purposes of the Federal Trade Commission Act.

Here we have a situation which we believe is unique in Commission history in that the orders were explicitly and completely linked with the proposed rulemaking. Respondents were engaged in practices that were industry-wide and their practices were deemed no worse than those of the industry as a whole. It was because of this conjunction that the then-Bureau Director stated that the orders would be superceded by any rule that was promulgated; there is no indication that the Commission thought otherwise at the time. Moreover, it was fully anticipated by the Commission at the time that a rule embodying provisions substantially similar to those contained in the orders eventually would be promulgated. However, the Commission instead later determined to end the rulemaking proceeding based upon its review of a completed record. Under these unprecedented circumstances, we conclude it would be in the public interest to vacate these orders, which consisted substantially of the remedies contemplated and rejected in the rulemaking.[2]

Based on the foregoing, we conclude that petitioners have demonstrated that the public interest requires reopening each proceeding and vacating each order.

It is therefore ordered, That the proceedings be reopened and that the orders issued on March 4, 1975, in Docket No. C-2640, C-2641, C-2642 and C-2643 be vacated.

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I agree that the petitioners have demonstrated that the public interest requires reopening and vacating the orders in Docket Nos. C-2640, C-2641, C-2642 and C-2643. I differ, however, from the majority's explanation of why such action is in the public interest.

Under the public interest standard of Section 5(b), a petitioner must demonstrate as a threshhold matter some affirmative need to modify or set aside the order. *See, e.g., Damon Corp.*, Docket No. C-2916, letter to Joel E. Hoffman, Esq. (March 24, 1983) (unpublished). A showing that an order impedes competition is sufficient to meet that standard. *Control Data Corp.*, Docket No. 8940, letter to Steven J. Olson (April 22, 1988) (unpublished) ("Control Data letter"). The threshhold showing that the order impedes the petitioners' ability to compete has been made here. Compliance data obtained by subpoena from petitioners Fleetwood, Redman, and Skyline demonstrate that these orders impede their ability to compete by imposing costs on petitioners but not on their competitors. *See William H. Rorer, Inc.*, 104 FTC 544, 547 (1984).

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[2] We find it unnecessary to reach petitioners' arguments of changed conditions of law or fact and express no opinions on their merits.

Once the threshhold showing is made, the Commission will weigh the reasons favoring the modification against any reasons not to make that modification.[1] *See, e.g.*, Control Data letter at 8. Here, there appears to be no reason not to vacate the orders. These orders are essentially identical to the proposed industrywide trade regulation rule that the Commission declined to promulgate in 1986 because the Commission concluded that the proposed rule would not benefit consumers. Because these orders address the same practices and contain essentially the same provisions as the proposed rule, it is reasonable to conclude that these orders, like the proposed rule, do not benefit consumers.

At least two reasons support vacating the orders. First, as discussed above, the orders impose costs that place the petitioners at a competitive disadvantage. Second, the petitioners and the Commission assumed that these orders eventually would be superseded by a trade regulation rule that would impose the same requirements on all manufacturers of mobile homes. The Commission's decision not to promulgate an industrywide rule appears to have been completely unanticipated.

Because the petitioners have demonstrated an affirmative need to vacate the orders, and because the reasons in favor of vacating the orders outweigh the reasons against vacating the orders, I conclude that the petitioners have demonstrated that the public interest requires reopening and vacating each of these orders.

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[1] This approach is similar to that followed by courts when they decide whether to modify final court orders. *See, e.g., United States v. Swift & Co.*, 286 U.S. 106, 114–15 ("[A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong"); *Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982).

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